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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

ERIE LACKAWANNA INC.,
JOHN HENNING, and VICTOR LASCALA,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT**

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QUESTION PRESENTED

Does federal bankruptcy law permit a “‘hybrid’ reorganization-liquidation” under which the debtor corporation can emerge from a bankruptcy proceeding immunized from non-discharged claims when such immunity is not possible in either a liquidation or a conventional reorganization?

DESIGNATION OF CORPORATE RELATIONSHIPS

Petitioner, Consolidated Rail Corporation, is a publicly held corporation that is not owned by any parent corporation. Consolidated Rail Corporation has an ownership interest in the following companies: Akron & Barberton Belt Railroad Company; Albany Port Railroad Company; Belt Railroad Company of Chicago; Calumet Western Railway Company; Chicago & Western Indiana Railroad Company; Fruit Growers Express Company; Indiana Harbor Belt Railroad Company; Lakefront Dock & Railroad Terminal Company; Monongahela Railway Company; Nicholas, Fayette & Greenbrier Railroad Company; Peoria & Pekin Union Railway Company; Pittsburgh, Chartiers & Youghioghenny Railway Company; and Trailer Train Company. Consolidated Rail Corporation does not have an ownership interest in any other company, except for its wholly-owned subsidiaries.

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**PETITION FOR A WRIT OF CERTIORARI
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Petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on October 21, 1986. It does so because, contrary to federal bankruptcy law, the court below has devised a way for a debtor corporation to emerge from a consummated bankruptcy proceeding insulated from liability for claims that were not discharged in the proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals (A-1 to A-8) is reported at 803 F.2d 881 (6th Cir. 1986). The district court opinion affirmed by the decision below (A-9 to A-32) has not been officially reported.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals (A-37 to A-38) was entered on October 21, 1986. A timely petition for rehearing was denied on January 6, 1987 (A-39). This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of the Bankruptcy Act of 1898, 30 Stat. 544 (1898), as amended, former 11 U.S.C. §§ 1-755, the Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-1330, and the Regional Rail Reorganization Act of 1973, as amended, 45 U.S.C. §§ 701-797, are set forth in the appendix.

STATEMENT OF THE CASE

On June 26, 1972, Erie Lackawanna Railway Company filed for reorganization under Section 77 of the Bankruptcy Act of 1898, as amended, former 11 U.S.C. § 205 (A-184 to A-210).¹ In so doing, Erie Lackawanna joined several other northeastern and midwestern railroads, including the Penn Central Transportation Company, which were involved in similar bankruptcy proceedings. In response to the rail transportation crisis that loomed when Erie Lackawanna and the other railroads sought protection from their financial difficulties in bankruptcy courts, Congress enacted the Regional Rail Reorganization Act of 1973 (the "Rail Act"). *See Regional Rail Reorganization Act Cases*, 419 U.S. 102,

1. The Bankruptcy Act of 1898 has been replaced prospectively by the Bankruptcy Reform Act of 1978 ("Bankruptcy Code"), which went into effect on October 1, 1979. Most Bankruptcy Code provisions apply only to bankruptcy cases filed on or after that date.

108-09 (1974). The Rail Act, which was subsequently amended several times and is now codified at 45 U.S.C. §§ 701-797, provided for the formation of a new railroad, petitioner Consolidated Rail Corporation ("Conrail"). 45 U.S.C. § 741. Conrail's rail assets were to come from various reorganizing railroads, including Erie Lackawanna. *See* 45 U.S.C. §§ 742-43. Conrail received those assets and commenced operations on April 1, 1976.

Erie Lackawanna's reorganization proceeding continued for several years after it conveyed most of its rail properties to Conrail. The Rail Act had amended federal bankruptcy law so that a railroad such as Erie Lackawanna, which was unable to reorganize on an income basis as a railroad, could nevertheless reorganize to continue as a non-railroad. *See* 45 U.S.C. § 791(b)(4) (A-211). The Rail Act also enabled a railroad to elect the alternative of liquidating if that were found to "be in the best interests" of the bankruptcy estate. *Id.*

Erie Lackawanna's trustees formulated a Plan of Reorganization (A-40 to A-107) to deal with Erie Lackawanna's outstanding liabilities and remaining assets, which included \$361,128,421 that Erie Lackawanna had received in cash from the United States as payment for the rail assets transferred to Conrail (A-55). Under the Plan of Reorganization, Erie Lackawanna Railway was to change its name to Erie Lackawanna Inc., amend its certificate of incorporation, and become, in the words of the Plan, the "Reorganized Company" (A-57, A-60, A-110). Erie Lackawanna's unsecured creditors were to receive shares in the Reorganized Company, which they could retain or sell since the stock was to be publicly traded (A-51, A-60, A-67, A-72). The Plan provided that the Reorganized Company, after marshalling its assets, would liquidate unless seventy-five percent of the shareholders voted to continue operations (A-68).²

2. In February, 1984, the Reorganized Company's board of directors unanimously proposed that the company continue in existence and not liquidate (A-138). That proposal was withdrawn shortly before the argument in this case in the court of appeals, so no shareholder vote on the proposal to continue operations indefinitely has yet occurred.

On October 29, 1982, the United States District Court for the Northern District of Ohio, Erie Lackawanna's reorganization court, entered the Consummation Order (A-108 to A-127), authorizing consummation of the Plan and establishing November 30, 1982, as the "Consummation Date". Effective that date, the remaining Erie Lackawanna Railway assets became vested in respondent, the Reorganized Company, which assumed the obligation to satisfy claims in accordance with the terms of the Plan (A-124). Also on the Consummation Date, the reorganization court entered the Final Decree (A-128 to A-133), which concluded Erie Lackawanna's reorganization proceeding.

After the Consummation Date, the Reorganized Company was sued in a number of actions and third-party actions that arose out of Erie Lackawanna Railway's conduct before the Consummation Date. Most of the actions involved claims by former Erie Lackawanna Railway employees for latent occupational injuries. Those actions, which were instituted under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, had been filed after the Consummation Date because the employees' injuries had only then become manifest. In some of the FELA actions, former Erie Lackawanna Railway employees sued Conrail, which filed third-party claims against the Reorganized Company for contribution or indemnity. Conrail also filed a third-party action for contribution or indemnity against the Reorganized Company in a non-FELA case in which the State of New York had sued Conrail after the Consummation Date to recover the costs of cleaning up a petroleum leak on property previously owned by Erie Lackawanna Railway.

In response to the lawsuits brought by former employees and Conrail, the Reorganized Company petitioned Erie Lackawanna's reorganization court, the United States District Court for the Northern District of Ohio, for an injunction barring its former employees and Conrail from pursuing their claims. The Reorganized Company invoked that court's jurisdiction under the Final Decree entered in the Erie Lackawanna reorganization, in which the court had reserved jurisdiction to enforce

injunctive provisions of that decree (A-129, A-132). The Honorable Robert B. Krupansky of the United States Court of Appeals for the Sixth Circuit, who had presided over Erie Lackawanna Railway's reorganization proceeding and was sitting by designation in the district court, declared that the claims had been discharged by the reorganization proceeding and enjoined their prosecution against the Reorganized Company (A-9 to A-32).

Although the district court recognized that the injuries involved in the claims had not become manifest until after the Consummation Date of Erie Lackawanna's reorganization, it nevertheless held that the employees and Conrail had had "claims" as of that date within the meaning of Section 77 of the Bankruptcy Act, the statute under which Erie Lackawanna had been reorganized. In its opinion, the district court expressly rejected the holding in *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 106 S.Ct. 183 (1985), in which the United States Court of Appeals for the Third Circuit had held that claims of former railroad employees for latent occupational injuries that did not become manifest until after their employers' reorganizations as non-railroads were not "claims" that could have been discharged by their employers' bankruptcy proceedings, could not be enjoined, and were properly the responsibility of the reorganized companies.

Conrail and two former Erie Lackawanna Railway employees, John Henning and Victor LaScala, appealed the district court's decision to the United States Court of Appeals for the Sixth Circuit. The court of appeals affirmed the district court's order barring suits against the Reorganized Company, but the court of appeals ignored the district court's analysis and never reached the question of whether the former employees' and Conrail's claims had been discharged. The court of appeals thus avoided a direct conflict with the decision of the United States Court of Appeals for the Third Circuit in *Schweitzer v. Consolidated Rail Corporation* (See A-2 n. 1).

Despite the consummation of the Plan of Reorganization and the emergence and continued existence of the Reorganized Company, the court of appeals said that Erie Lackawanna Railway's bankruptcy proceeding was a "'hybrid' reorganization-liquidation" (A-5), which was more like a liquidation than a reorganization (A-2). The court then opined that the claims being asserted by former Erie Lackawanna Railway employees and Conrail "could not ensue" if Erie Lackawanna Railway had actually liquidated (A-5) and held that the claims could not be brought against the Reorganized Company. According to the court of appeals, "the nature of a restructuring of [Erie Lackawanna Railway], in which general unsecured creditors became shareholders of [the Reorganized Company] mitigates against holding [the Reorganized Company] liable on *any* claims" (A-2) (emphasis added).

Petitioner Conrail, Mr. Henning, and Mr. LaScala filed timely petitions for rehearing and suggestions of rehearing in banc, which were denied by order entered on January 6, 1987 (A-39).

REASON FOR GRANTING THE WRIT

THERE IS NO BASIS IN FEDERAL BANKRUPTCY LAW FOR A “‘HYBRID’ REORGANIZATION- LIQUIDATION” THAT IMMUNIZES A CORPORATE DEBTOR FROM LIABILITY FOR NON-DISCHARGED CLAIMS.

By pronouncing Erie Lackawanna Railway's bankruptcy proceeding to have been a “‘hybrid’ reorganization-liquidation” (A-5) and by concluding in a non-sequitur that the Reorganized Company cannot be held liable on any claims, the court of appeals has devised a novel means by which a corporation can use the federal bankruptcy statutes so as to enjoy the benefits of both reorganization and liquidation without paying the price of either. Under the court of appeals holding, a corporation can now emerge from a bankruptcy proceeding with substantial assets and continue in operation in perpetuity — a result that cannot be achieved in a liquidation, where all operations cease and all assets are distributed. At the same time the court of appeals holding immunizes the ongoing corporation from liability for claims that have not been held to have been discharged in its bankruptcy proceeding — a result that cannot be achieved in a reorganization, where the reorganized company must remain liable for all non-discharged obligations.

The “‘hybrid’ reorganization-liquidation” concept, which the court of appeals concocted retroactively to give the Reorganized Company immunity from claims that have not been discharged, is based on a fiction. The fiction is that the Erie Lackawanna Railway liquidated. It did not. It continues to exist as the Reorganized Company, a publicly held corporation with substantial assets and earnings as its most recently published annual report (A-134 to A-151) makes clear. What the United States Court of Appeals for the Sixth Circuit created on a fictional basis, a “‘hybrid’ reorganization-liquidation” with concomitant immunity from non-discharged claims for the resulting reorganized

company, conflicts with federal bankruptcy law as interpreted by the United States Courts of Appeals for the Eighth and Ninth Circuits and as embodied in the absolute priority rule.

A. The Sixth Circuit's Grant of Immunity to Respondent Reorganized Company Is in Conflict with Federal Bankruptcy Law as Interpreted by the Eighth and Ninth Circuits.

A company that has reorganized under any applicable section of the present or former bankruptcy statutes remains liable for claims that are not found to have been discharged in its reorganization proceeding. *See, e.g., United States v. River Coal Co.*, 748 F.2d 1103, 1106-07 (6th Cir. 1984); *Gee v. Tenneco, Inc.*, 615 F.2d 857, 862 (9th Cir. 1980); *Hugh H. Eby Co. v. United States*, 456 F.2d 923 (3d Cir. 1972); *Schweitzer v. Consolidated Rail Corp.*, 65 Bankr. 794, 798 (E.D. Pa. 1986). *See also* Jackson, *Avoiding Powers in Bankruptcy*, 36 Stanford L. Rev. 725, 727n.8 (1984); 15 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 7329 (rev. perm. ed. 1983).

The court of appeals has abandoned this fundamental principle of bankruptcy law by insulating respondent Reorganized Company from non-discharged claims simply because the Plan of Reorganization provides for possible eventual liquidation of the Reorganized Company. The court of appeals holding is in direct conflict with the decisions of the United States Courts of Appeals for the Eighth and Ninth Circuits in *Bankers Life and Casualty Co. v. Kirtley*, 338 F.2d 1006, 1009 (8th Cir. 1964), and *Kelce v. U.S. Financial Inc.*, 648 F.2d 515, 521 n. 11 (9th Cir. 1980), *cert. denied*, 451 U.S. 970 (1981). In those cases, the courts found that the same rules and principles apply to reorganizations whether the reorganization plan involved provides for a rehabilitated ongoing reorganized company or contemplates eventual liquidation of the reorganized entity. And countless decisions have recognized that a plan providing for liquidation of the reorganized entity is nonetheless a proper plan of reorganization. *See, e.g., In re Combined Metals Reduction Co.*, 557 F.2d 179, 198 (9th Cir. 1977); *In re Chelsea Hotel Corp.*, 246 F.2d 133, 134 (3d Cir. 1957); *In re Central Funding Corp.*, 75 F.2d 256, 259 (2d Cir.

1935). Proceedings contemplating such eventual liquidation remain reorganizations nonetheless, subject to the principles and the balancing of equities that Congress provided for reorganizations.

In *Bankers Life and Casualty Co. v. Kirtley*, the United States Court of Appeals for the Eighth Circuit considered and rejected appellants' contention "that since the plan for reorganization approved provided for a complete liquidation, the proceeding is equivalent to an ordinary bankruptcy and that the law applicable to ordinary bankruptcy liquidation applies." 338 F.2d at 1009. If the proceeding had been a true liquidation in ordinary bankruptcy, the surplus remaining after satisfying the creditors' claims would have been returned to the shareholders and there would have been no authority for subordinating one class of shareholders to another. But the court held that the rules of reorganization permitting the subordination of a class of stockholders were fully applicable despite the liquidating nature of the proceeding, since it was nonetheless a proceeding under a reorganization statute.

In *Kelce v. U.S. Financial Inc.*, the United States Court of Appeals for the Ninth Circuit explained why the same principles must apply to reorganized companies whether or not the applicable plans of reorganization contemplate eventual liquidation. The court stated:

[Appellant] Kelce also points out that the commentators cited by the courts below stress the rehabilitative aspects of Chapter X reorganization plans in formulating their conclusions. He argues that the rationales relied on by those commentators do not apply to a Chapter X plan of reorganization the goal of which is liquidation rather than rehabilitation. We decline to make that distinction. The term "reorganization plan" encompasses both plans which envision rehabilitation and those whose goal is liquidation. . . .

It might well prove impossible to reorganize a corporation were we to provide for the application of different rules and

standards to plans providing for rehabilitation than we require for plans providing for liquidation. A trustee in a . . . situation, where the goal of the plan changed over time, would then have to comply with two different sets of standards. Such confusion is unwarranted.

Finally, as we have noted, the absolute priority rule was designed to reward expectations. Those expectations are formed at the time of investment or loan, and by definition are not affected by the ultimate goal of a reorganization plan. We would do violence to the provisions of Chapter X were we to recognize such a liquidation-rehabilitation distinction, and we decline to do so.

648 F.2d at 521 n. 11.

The conclusion of the court below that the liquidating nature of Erie Lackawanna's reorganization allowed the court to jettison the rule that a reorganized company is liable for non-discharged obligations clearly conflicts with the law as interpreted by the Eighth and Ninth Circuits.

The court below reached its anomalous result because of basic flaws in its analysis. First, in finding that Erie Lackawanna's restructuring should be viewed as comparable to a liquidation, the court of appeals misconstrued section 601(b)(4) of the Regional Rail Reorganization Act of 1973, 45 U.S.C. § 791(b)(4)(A) (A-211), which permitted the district court to "reorganize or liquidate" Erie Lackawanna Railway (emphasis supplied). The Rail Act gave the reorganization court discretion either to reorganize under Section 77 or to liquidate pursuant to some other section of the Bankruptcy Act. See, e.g., *In re Lehigh Valley R.R.*, 558 F.2d 137, 142 (3d Cir. 1977). It did not give the reorganization court carte blanche to fashion unique protectionist rehabilitative remedies not provided for in the federal bankruptcy statutes.

In this case, Erie Lackawanna's bankruptcy proceeding was conducted under Section 77 from start to finish. While a plan of reorganization may properly contemplate the ultimate, post-

bankruptcy liquidation of the reorganized company, the proceeding is nonetheless a reorganization, and all of the principles of reorganization apply.

The court of appeals believed that Erie Lackawanna's reorganization was in effect a liquidation because the plan of reorganization contemplated the possibility of the eventual, post-bankruptcy liquidation of the Reorganized Company, because the Reorganized Company's shareholders were its former unsecured creditors, rather than its former owners, and because the Reorganized Company was not in the railroad business. But none of these factors permits the conclusion that Erie Lackawanna's reorganization proceeding amounted to a liquidation.

The fact that the plan contemplated future liquidation disproves present liquidation. And the fact that Erie Lackawanna's unsecured creditors became the Reorganized Company's shareholders does not convert the reorganization into a liquidation. It frequently happens that a corporate debtor, lacking the cash to pay its creditors in full, issues them some or all of the shares in a reorganized company. See 11 U.S.C. § 1123(a)(5)(J) (A-126). By agreeing to accept securities of the Reorganized Company in lieu of a cash distribution from a liquidating estate, the creditors bargained for "equity-type rewards in exchange for equity-type risks. . ." *Kelce v. U.S. Financial Inc.*, 648 F.2d at 520. The Reorganized Company's shareholders have reaped the equity-type rewards of the Reorganized Company's continued operations. There is no basis for insulating them from the equity-type risks for which they also bargained. Finally, it is of no consequence that the Reorganized Company is not in the railroad business. That a reorganization takes a bankrupt company out of the rail business does not prevent its ongoing reorganization under Section 77 of the Bankruptcy Act. In relying upon these false indicia, the court below overlooked the true and only hallmark of a reorganization as opposed to a liquidation: the continued existence of the same corporate entity.³

3. In contrast to the court of appeals treatment of the Reorganized Company as wholly different from other reorganized former railroads, the Special Court, which was established by the Rail Act and has exclusive jurisdiction to

An even more basic flaw in the analysis of the court below is a complete misreading of the effect of the liquidation of a corporate debtor. While liquidation of the Erie Lackawanna Railway might have made it impossible for claimants to collect monies owed them by that company, liquidation would not have discharged their claims, and, had the Erie Lackawanna been found to have excess assets after liquidation, those assets would have been available to pay claimants. *See, e.g.*, Bankruptcy Act of 1898, as amended, § 57n, former 11 U.S.C. § 93n (A-182 to A-183). *Cf.* 11 U.S.C. § 726(a)(2)(C) (A-212). On the other other hand, when, as in this case, a debtor continues its existence and retains assets in a "reorganized company," it remains liable for all of the debtor's obligations that were not discharged upon consummation of the plan of reorganization. *See, e.g., Schweitzer v. Consolidated Rail Corp.*, 65 Bankr. at 798. This is fundamental bankruptcy law that the court of appeals simply ignored.

Outside bankruptcy, as the Reorganized Company is, any corporation may decide to liquidate, but it does not thereby immunize itself from liabilities incurred before it liquidates in fact. The Reorganized Company may be contemplating liquidation, but for now it is still in existence, earning millions of dollars annually, and holding substantial assets against which any judgment creditor could execute.

NOTES (*Continued*)

interpret certain sections of that act and related legislation, recently found in consolidated actions involving the exercise of its exclusive jurisdiction that the Reorganized Company was in the same position as several other former railroads that had conveyed rail assets to Conrail and reorganized as non-railroads. *See Consolidated Rail Corp. v. Reading Co.*, _____ F. Supp. _____, Nos. 82-29, 84-9, 85-2, slip op. (Regional Rail Reorg. Ct. Jan. 27, 1987) (A-152 to A-177). Referring to the Erie Lackawanna, Penn Central, Reading and Central of New Jersey railroads, the Special Court said:

The predecessor railroads of Conrail and Amtrak that employed the employee claimants have undergone reorganization, final consummation orders have been entered, and each railroad has been discharged in bankruptcy. Hence, none of the railroads in question are any longer "subject to a bankruptcy proceeding". . . .

Id. (A-157 to A-158).

In the four years since the final decree was entered in Erie Lackawanna's reorganization proceeding, the Reorganized Company's shares have been publicly traded, its shareholders' equity has more than doubled to \$94,000,000, and its assets have grown to \$150,000,000 (A-134). The Reorganized Company has exploited the value of the net operating loss carryforwards it had before emerging from bankruptcy (A-144). It has received the benefit of the payment of more than \$361,128,421 for the Erie Lackawanna rail assets sold to Conrail (A-55). It has operated as a profitable corporation. But, if the decision below stands, the Reorganized Company has obtained these benefits at the expense of Erie Lackawanna's former employees, whose personal injury claims would have had priority in a true liquidation over the claims of the unsecured creditors who became the Reorganized Company's shareholders. *See* Bankruptcy Act of 1898, as amended, §77n, former 11 U.S.C. § 205n (A-205 to A-206).

The greatest anomaly of the decision below may yet unfold. Although Erie Lackawanna reorganized as a corporation that *may* liquidate in the future, there is no requirement in its plan of reorganization that it actually liquidate and no assurance that it will do so. Indeed, as noted above, the Reorganized Company's board of directors unanimously adopted a resolution in 1984 to urge the shareholders to make the Reorganized Company a perpetual corporation. That resolution was withdrawn for the time being a few weeks before this case was argued in the court of appeals. But nothing prevents the Reorganized Company from deciding to abandon any intent to liquidate. Thus, if this petition is denied, an almost incredulous result could ensue. The court below will have treated Erie Lackawanna as liquidated, free from non-discharged liabilities, and this Court will have allowed that ruling to stand — only to find that the legally-liquidated Erie Lackawanna, a few weeks after its judicial success, votes to abandon any liquidation efforts and sails unencumbered into the twenty-first century.

Unless this Court acts, there is no reason why any corporation in bankruptcy could not structure its reorganization to include a liquidation option, and thus cut off claimants holding

non-discharged claims. That was never the intent of Congress in enacting any of the federal bankruptcy statutes.

B. The Sixth Circuit's Grant of Immunity to Respondent Reorganized Company Is in Conflict with the Absolute Priority Rule of Federal Bankruptcy Law.

The holding below totally subverts the rules of bankruptcy priority by barring Erie Lackawanna's priority claimants from recovering anything on their claims, while immunizing the Reorganized Company from liability for the sake of Erie Lackawanna's former unsecured creditors. This result conflicts with both the congressionally mandated claim priority scheme and the absolute priority rule pronounced by this Court.

Under Section 77, the personal injury claims of former Erie Lackawanna employees were required to be paid in full as administrative priority expenses before Erie Lackawanna's general creditors were entitled to any payment. Bankruptcy Act of 1898, as amended, § 77n, former 11 U.S.C. § 205(n) (A-205 to A-206). The holding below violates this statutory priority by immunizing respondent from liability for the employees' claims so as to protect the interests of Erie Lackawanna's former unsecured creditors, and even to protect the interests of those shareholders in the Reorganized Company who were never creditors of Erie Lackawanna but who purchased their shares through public trading since 1982. By elevating the interests of shareholders and unsecured creditors over the rights of claimants holding non-discharged priority claims, the court below has stood the priority scheme on its head.

To the same extent, the holding violates the absolute priority rule, first articulated by this Court in *Northern Pacific R.R. v. Boyd*, 228 U.S. 482 (1913). *Boyd* involved a reorganization through judicial foreclosure sale, under which a new corporation was formed with the assets of the old and with the former shareholders continuing as shareholders of the new corporation. A creditor of the old corporation later sued the new corporation.

This Court held that a reorganization that permitted shareholders to participate at the expense of creditors was void. Even if the reorganization took place "in good faith and ignorance of [the Creditor's] claim, [the shareholders] were none the less bound to recognize his superior right in the property, when years later his contingent claim was liquidated and established." 288 U.S. at 504.

This holding evolved into what is known as the absolute priority rule, requiring each class of claims or interests to be satisfied in full before any payment can be made to a subordinate class. *Consolidated Rock Co. v. DuBois*, 312 U.S. 510, 527-528 (1941). The absolute priority rule applies in all federal bankruptcy proceedings, including section 77 proceedings. *Ecker v. Western Pacific R.R.*, 318 U.S. 448 (1943). As a result of the decision below, creditors holding non-discharged priority claims have been enjoined from ever receiving payment on their claims. Meanwhile, respondent Reorganized Company is declared immune from liability on such claims, so that a class of subordinate creditors can preserve and increase the value of the distributions they have received. This result cannot be countenanced under any principle of bankruptcy priority.

CONCLUSION

For the foregoing reason, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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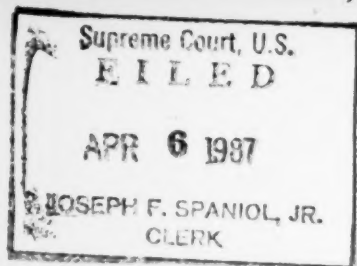
**Counsel of Record*

Dated: April 6, 1987



86 1612

No. _____



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

ERIE LACKAWANNA INC.,
JOHN HENNING, and VICTOR LASCALA,

Respondents.

**APPENDIX TO PETITION
FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT**

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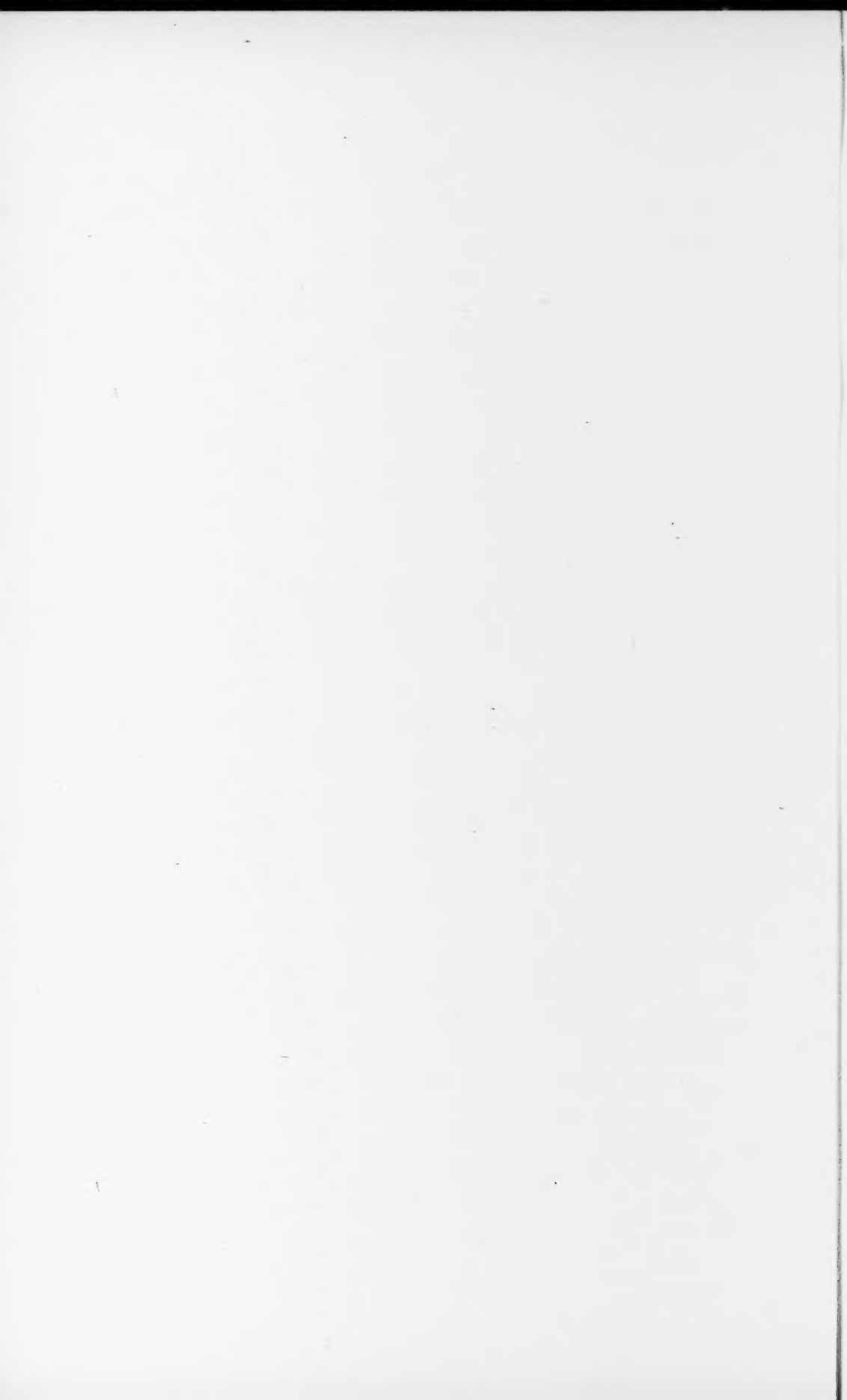
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Nos. 85-3588; 85-3610
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In Re: ERIE LACKAWANNA RAILWAY COMPANY,
Debtor.

ERIE LACKAWANNA RAILWAY COMPANY,
Petitioner-Appelle,

v.

JOHN HENNING; VICTOR LASCALA, (85-3588),
CONSOLIDATED RAIL CORPORATION, (85-3610,) *Respondents-Appellants.*

ON APPEAL from the United States District Court for the
Northern District of Ohio.

Decided and Filed October 21, 1986

Before: KEITH and GUY, Circuit Judges; and BALLANTINE,* District Judge.

KEITH, Circuit Judge. Appellants, Consolidated Rail Corporation (Conrail), John Henning and Victor LaScala, appeal the district court's June 18, 1985, order enjoining their asbestos-related claims against Erie Lackawanna Railway Company (Debtor). The key issue on appeal is whether to construe the Debtor's restructuring pursuant to Section 77 of the Bankruptcy Act of 1898, formerly 11 U.S.C. §205, in conjunction with the Regional Rail Reorganization Act ("Rail Act") (as amended 45 U.S.C. §701 *et seq.*) as a reorganization or a liquidation. The "new" company emerging from the restructuring was Erie Lackawanna, Inc. Appellants contend the restructuring was essentially a traditional reorganization, which should not insulate Erie Lackawanna, Inc. from post-reorganization claims. A

*Honorable Thomas A. Ballantine, Jr., United States District Court for the Western District of Kentucky, sitting by designation.

“straight” liquidation, however, should preclude claims through the dissolution of the Debtor company. We hold that the restructuring of Debtor was more in the nature of a liquidation than reorganization.¹ Moreover, the nature of a restructuring of Debtor, in which general unsecured creditors became shareholders of Erie Lackawanna, Inc., mitigates against holding Erie Lackawanna, Inc. liable on any claims. For the reasons discussed below, the decision of the district court is affirmed.

I.

BACKGROUND

Section 77 of the Bankruptcy Act² was supplemented in 1973 by the Rail Act to confront and accommodate the existing crisis of the northeast railroads, including the Debtor. The Rail Act was promulgated by Congress to facilitate the reorganization of these railroads into a single viable system to be operated by Conrail. Thus, we are dealing with a “hybrid” proceeding in which we must consider the interaction of Section 77 with the Rail Act.

Pursuant to the Rail Act on March 30, 1976, the Debtor ceased all rail operations and shortly thereafter the bulk of its rail properties were conveyed to Conrail, thereby concluding the Debtor's tenure as an operating railroad. Subsequent to this conveyance, the Debtor's limited resources precluded its reorganization as an ongoing business entity. Its Final Plan of

1. Accordingly, we need not reach the issue of whether appellant's claims arose before the bankruptcy Consummation Date of November 30, 1982, which discharged pre-organization claims against the Debtor. We will not address the issue whether to follow *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir) cert. denied, 106 S. Ct. 183 (1985), which held that an asbestos related personal injury action, had not manifested itself prior to the Consummation Date (although the injury occurred prior to bankruptcy) of the employer's reorganization in bankruptcy was *not* a claim dischargeable under the consummation plan. *Schweitzer* held that such a claim arises only when the injury manifests itself.

2. On June 4, 1972, Debtor filed for reorganization pursuant to Section 77 of the Bankruptcy Act which was directed exclusively to railroad reorganizations.

Reorganization evolved, pursuant to Section 77, as a "liquidating" plan consistent with the Rail Act, which provided that the bankruptcy court:

shall proceed to reorganize or liquidate such railroad in reorganization pursuant to Section 77 on such terms as the court deems just and reasonable, or pursuant to any other provisions of the Bankruptcy Act, if the court finds that such action would be in the best interests of such estate.

45 U.S.C. §791(b)(4).

During the intervening ten-year period between June of 1972, (when Debtor originally filed for bankruptcy under Section 77) and November of 1982, the parties proceeded to readjust the entire financial structure of the Debtor. The rights of creditors and security holders were materially modified and altered so as to best serve all interested parties including the Debtor, through the formulation of a plan that was fair and equitable to all classes of creditors.

A reorganization plan was approved by the district court in July, 1982, characterized as a "liquidating plan of reorganization". Under the Plan, the claims of priority and secured creditors were satisfied in full by the payment of cash. The general unsecured creditors were issued new Erie common stock in satisfaction of their claims. These creditors received approximately \$52.00 per share in satisfaction for \$100.00 of allowed claim. The majority of the Board of Directors of Erie Lackawanna Inc. was composed of those general unsecured creditors who received shares. As stated in the Plan of Reorganization, "The general program of activities to be carried on by the Reorganized Company will be to liquidate its remaining assets as expeditiously as practicable. . . ." However, the Plan had an "escape clause" in which liquidation could be avoided by a 75% vote of the shareholders, in which case "the Reorganized Company, in lieu of liquidation, may continue in operation for such business purposes as the holders of the Capital Stock may determine . . ." Thus, the new reorganized Erie appears to be a corporation of the creditors, by the creditors and for the creditors.

The court-approved plan of reorganization was consummated by a final decree of discharge on November 30, 1982. Section 3.04 of the Consummation Order provided, in pertinent part, that:

The Debtor and the Debtor's Trustees shall, as of the Consummation Date, be discharged and released forever from

(a) All obligations, debts, liabilities and claims against the Debtor, whether or not filed or presented, whether or not approved, acknowledged or allowed in these proceedings and whether or not provable in bankruptcy, including without limitation all claims assumed or guaranteed by the Debtor or enforceable against the property of the Debtor;

Paragraph 3 of the order permanently enjoined all persons and entities from prosecuting any action against Erie on account of any claim against the Debtor, except as permitted in the Plan.

Appellants Henning and LaScala filed actions in the United States District Court for the Eastern District of Pennsylvania under the Federal Employer's Liability Act ("FELA"), 45 U.S.C. §§51-60, to recover for asbestos-related injuries that they alleged had been caused by asbestos exposure during their railroad employment. The injuries had not become manifest, and thus their actions had not been filed, until after the consummation of Debtor's reorganization proceeding. Other former Erie Lackawanna Railway (Debtor) employees who manifested symptoms of latent occupational injuries after the consummation of Debtor's reorganization, sued Conrail for asbestos-related injuries in the United States District Court for the Western District of New York and the Superior Court of New Jersey for Hudson County. Conrail, in turn, filed third-party claims to recover contribution or indemnity from the reorganized Erie Lackawanna, Inc. Conrail also filed a third-party action against Erie Lackawanna, Inc., for contribution or indemnity in a case pending in the New York Supreme Court, Albany County, in which Conrail was sued after the consummation of Erie's reorganization for costs of cleaning up a petroleum leak on property previously owned by Erie Lackawanna Railway.

Erie Lackawanna, Inc., petitioned the United States District Court for the Northern District of Ohio, which had presided over its bankruptcy reorganization, for a declaration that the claims of Mr. Henning, Mr. LaScala, and Conrail were discharged in its reorganization, and asked the court to enjoin the prosecution of their claims. The Honorable Robert Krupansky, who presided over Erie's reorganization, sitting by designation in the district court for the Northern District of Ohio, granted Erie's petition for declaratory and injunctive relief. It is from this order appellants appeal.

II. DISCUSSION

The central issue is whether Erie's bankruptcy proceeding—in which Erie Lackawanna Railway was restructured into Erie Lackawanna Inc.—should be construed as a "liquidation" or "reorganization". If Erie underwent a "straight" liquidation, then it is clear appellants' claims could not ensue: there would be no company left which suit could be brought against. Conversely, if the present restructuring should be characterized as a conventional reorganization, then it is arguable that claims could be brought.

Appellants argue that Debtor Erie Lackawanna Railway's bankruptcy proceeding was a reorganization in both form and substance, and that accordingly debtor should not be able to escape its liabilities in perpetuity. Appellees argue that Debtor's restructuring was more similar to a liquidation, and therefore appellants' claims were properly barred. Due to the unique factual-legal aspects of this case, we find the "reorganization" vs. "liquidation" analysis somewhat facile. Indeed, in the instant case we are dealing with a "hybrid" reorganization-liquidation which cannot easily be pigeon-holed for analysis.

The present bankruptcy restructuring was conducted pursuant to the Rail Act of 1973. The Act "does not supersede §77, but merely supplements the reorganization provisions therein. . . ." *Collier on Bankruptcy*, ¶77.02 at 475 (14th ed.

1985). Section 77 of the Bankruptcy Act *only* deals with reorganization, with the purpose that "the reorganized road shall be a living, not a dying, railroad enterprise." *Van Schaick v. McCarthy*, 116 F.2d 987 (10th Cir. 1941). In contrast, the Rail Act specifically contemplates liquidation, the antithesis of reorganization, as an alternative. Section 791(b)(4) provides that the district court, supervising a bankruptcy:

shall proceed to reorganize *or liquidate* such railroad in reorganization pursuant to such Section 77 on such terms as the court deems just and reasonable, or pursuant to any other provisions of the Bankruptcy Act (11 U.S.C.A. §1 *et seq.*), if the court finds that such action would be in the best interest of such estate. (Emphasis added)

Paradoxical as it may seem, the Rail Act condones liquidation pursuant to a reorganization statute (i.e. §77).³ The facts of this case defy a simplistic "reorganization vs. liquidation" dichotomy. The Plan provided for a reorganization for the purpose of liquidation. However, there was an "escape clause" whereby a 75% vote of the shareholders could rescind the liquidation provision in favor of a continued business existence. In February of 1983, Erie Lackawanna, Inc.'s Board of Directors unanimously proposed continued existence over liquidation. The issue therefore arises whether the adoption of such a proposal transforms the liquidation into a reorganization.

An analysis of the underlying realities of this case, rather than fixating on semantic labels (i.e. reorganization or liquidation), convinces us that Debtor's restructuring should be viewed more as a liquidation, thereby precluding appellants' claims. Debtor's restructuring cannot be construed as a standard §77 reorganization whose purpose is "[B]y financial restructuring to

3. This "paradox" may be more apparent than real. Anderson & Wright, *Liquidating Plans of Reorganization*, 56 Am. Bankr. L. J. 29-30 (1982) states that "since approximately 1944 there has been a clear movement by courts to permit liquidations to be effectuated in reorganization proceedings. This judicial movement under the old Bankruptcy Act has culminated in the enactment of the new Bankruptcy Code, which contains certain enabling sections allowing liquidations as part of a reorganization proceeding."

put back into operation a going concern. [A]nd which will preserve an ongoing railroad in the public interest." *Baker v. Gold Seal Liquors*, 417 U.S. 467, 470-471 (1974). The restructuring of Erie was the antithesis of preserving a going concern: Erie Lackawanna Railway transferred the bulk of its rail properties to Conrail. Erie as a railroad company has henceforth ceased to exist. Accordingly, appellants' contention that "Erie is a reorganized company like any other reorganized company" is false.

In practical terms, Erie's restructuring was similar to a liquidation; the debtor's assets were used to satisfy the claims of creditors, and debtor's previous business (operating a railway line) ceased to exist. All that remained were the non-rail assets. There is no question that if the district court ordered a traditional "straight" liquidation, that appellants' claims could not ensue. Rather, the district court, pursuant to the *flexibility* the Rail Act provides,⁴ fashioned a restructuring that maximized the economic interests of all parties involved. Appellants were no worse off than under a straight liquidation. Moreover, under the Plan it is conceivable that the general unsecured creditors, who received Erie Lackawanna, Inc. stock, may be able to recoup their economic loss. These creditors received approximately 52¢ of new stock for every dollar they claimed. By leaving the bare bones of Erie intact, and by providing for the possibility of Erie Lackawanna, Inc.'s continued business existence, these creditors may be able to come out whole.

If a straight liquidation was ordered, nothing would prohibit the unsecured creditors from embarking on a new business enterprise with the funds they received, without the worry of a lawsuit. The district court's Plan of Reorganization merely gave the unsecured creditors a vehicle, in the form of Erie

4. Section 791(b)(4) empowers the district court to reorganize or liquidate on such terms as the court deems just and reasonable. An examination of the legislative history or case law does not explicate this language. We interpret it to give the district court flexibility in fashioning reorganizations: flexibility in the sense that the district judge need not be pigeon-holed in ordering a liquidation as opposed to a reorganization, but rather can devise "hybrid" reorganization-liquidations, which he deems "just and reasonable."

Lackawanna Inc., for pursuing the maximization of their economic interests. Moreover, it simultaneously gave those unsecured creditors, who needed cash quickly, the opportunity to sell their shares of Erie Lackawanna, Inc. stock on the market.

Appellants are not without remedy for their alleged injuries. Appellants are free to bring suit against the asbestos manufacturers and installers. Subjecting the unsecured creditors to massive liability, when appellants have other avenues of redress, would be palpably unjust.

Affirmed.

THE UNITED STATES DISTRICT COURT
THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In the Matter of

ERIE LACKAWANNA RAILWAY CO.

Debtor

In Proceedings for the Reorganization of a Railroad

No. B72-2838

ORDER NO. 1281

As prologue to addressing the issues of moment before the court a brief historical summary of this proceeding is in order.

Section 77 of the Bankruptcy Act (formerly 11 U.S.C. §205)¹ was supplemented in 1973 by the Regional Rail Reorganization Act ("Rail Act") (as amended, 45 U.S.C. §701 *et seq.*) to confront and accommodate the existing crisis of the northeast railroads, including the Debtor.² The Rail Act was promulgated by Congress to facilitate the reorganization of these railroads into a single viable system to be operated by Conrail. Pursuant to the Rail Act on March 30, 1976, the Debtor ceased all rail operations and shortly thereafter the bulk of its rail properties were conveyed to Conrail, thus concluding the Debtor's tenure as an operating railroad. Subsequent to this conveyance, the Debtor's limited

1. On June 4, 1972, Debtor filed for reorganization pursuant to Section 77 of the Bankruptcy Act which was directed exclusively to railroad reorganizations. The current Bankruptcy Code became effective October 1, 1979 and applies only to actions commenced thereafter. To the extent that any case interpreting the Code would articulate a different result than Section 77 with respect to the issues joined herein by the amended pleadings, it should be analyzed in light of the existing differences between the Act and the Code.

2. For purposes of this opinion, the Erie Lackawanna Railway Company is referred to as "the Debtor"; Erie Lackawanna, the reorganized company is referred to as "Erie"; Consolidated Rail Corporation is referred to as "Conrail", and the Final Plan of Reorganization is referred to as "the Plan".

resources precluded its reorganization as an ongoing business entity, and its Plan evolved, pursuant to Section 77, as a "liquidating" plan consistent with §601(b)(4) of the Rail Act, which provided that the bankruptcy court "shall proceed to reorganize or liquidate such railroad in reorganization pursuant to Section 77 on such terms as the court deems just and reasonable, or pursuant to any other provisions of the Bankruptcy Act, if the court finds that such action would be in the best interests of such estate." 45 U.S.C. §791. Accordingly, the Debtor was not restructured as an ongoing operational railroad but emerged as a completely different and distinct entity in the form of a liquidating corporation. It is not inconceivable, and perhaps more probable, that the Debtor as reorganized may cease to exist in the not too distant future.

During the intervening ten-year period between June of 1972 and November of 1982, the parties under the aegis of the reorganization court and pursuant to the mandate of §77 proceeded to readjust the entire financial structure of the Debtor and materially modify and alter the rights of creditors and security holders so as to best serve all interested parties including the Debtor, its creditors and security holders by formulating a plan that was fair and equitable to all classes of creditors. Bankruptcy Act, formerly 11 U.S.C. §205(b); *Van Schaik v. McCarthy*, 116 F.2d 987, 992 (10th Cir. 1941). Arduous, exhaustive and comprehensive negotiations and compromises were rewarded by a court-approved plan of reorganization which was consummated by a final decree of discharge on November 30, 1982 (Order No. 1235). The Consummation Order declared this court's exclusive jurisdiction over the Debtor and its property and "all claims . . . whether or not properly or timely filed and whether or not approved in these proceedings." *Id.* at 2. Section 3.01 of the Consummation Order, and Section 3.3 of the Plan, directed the transfer of the Debtor's properties to Erie, free and clear of all claims, subject to certain exceptions defined in the Plan. Section 3.04 of the Consummation Order provided, in pertinent part, that

The Debtor and the Debtor's Trustees shall, as of the Consummation Date, be discharged and released forever from

(a) All obligations, debts, liabilities and claims against the Debtor, whether or not filed or presented, whether or not approved, acknowledged or allowed in these proceedings and whether or not provable in bankruptcy, including without limitation all claims assumed or guaranteed by the Debtor or enforceable against the property of the Debtor;

Paragraph 3 of the order permanently enjoined all persons and entities from prosecuting any action against Erie on account of any claim against the Debtor, except as permitted in the Plan. Paragraph 4(vi) of the Final Decree reserved to this court's jurisdiction the authority to enforce the injunctive provisions of the final decree.

La Scala v. Consolidated Rail Corporation, et al. (Docket No. 84-1395) and *Henning v. Consolidated Rail Corporation, et al.* (Docket No. 84-1396) were commenced in the United States District Court for the Eastern District of Pennsylvania on March 22, 1984, approximately sixteen months after the final consummation date of the Debtor's Plan. It must be noted that during this intervening period and continuing thereafter, Erie stock has been actively traded on the open market. The complaints in both actions are virtually identical and named the same thirty companies as defendants. Apart from the Debtor, Erie, Conrail and New Jersey Transit Rail Operation (N.J. Transit) (collectively the "Railroad Defendants") the remaining named defendants are asbestos manufacturers, suppliers and installers. La Scala-Henning seek damages against the Railroad Defendants pursuant to the Federal Employer's Liability Act (FELA), 45 U.S.C. §§51-60, the Federal Safety Appliance Acts, 45 U.S.C. §§1-16 and the Boiler Inspection Acts, 45 U.S.C. 22-34. In these negligence actions La Scala-Henning charge that their exposure to products containing asbestos during their railroad employment resulted in the development of serious respiratory disease.

They also assert causes of action against the remaining defendants predicated on theories of negligence, strict product liability, breach of warranty, conspiracy, fraudulent concealment and misrepresentation.

On October 26, 1983, the State of New York initiated an action in the New York State Supreme Court, Albany County, against Conrail, alleging that it was strictly liable under Article 12 of the New York Navigation Law for the costs incurred by the State in removing and cleaning up a discharge of a petroleum product from the Hornell Railroad Yard into the Canisteo River. On February 14, Conrail initiated a third-party action (the "environmental action") against Erie as successor corporation of the Debtor for any liability Conrail may incur by virtue of its acquisition of the Hornell Railroad Yard from the Debtor in 1976, and against the City of Hornell Industrial Development Agency for any liability Conrail may incur by virtue of Conrail's sale of the yard to the agency in 1978.

La Scala-Henning urge this reorganization court to reopen its final order dated November 30, 1982, which discharged the Debtor and Erie from all future liability, in order to permit the prosecution of their respective claims against the Debtor and Erie for asbestos-related personal injuries which may have occurred prior to the final Discharge and Consummation Date of the Plan, but which did not manifest themselves until subsequent thereto. Conrail would also reopen the final bankruptcy discharge order to recover restitution from the Debtor and Erie for property damage which Conrail may have incurred as a result of the environmental action filed by the State of New York.

The issues presently confronting the Court were joined by Erie's petition seeking to declare the final discharge of the Debtor's estate and the final consummation of the Plan a bar against all post discharge claims asserted by La Scala, Henning and Conrail, and to permanently enjoin them from prosecuting their personal injury and/or property claims against the Debtor and Erie.

In effect, the asserted claims challenge the very essence of the Bankruptcy Act by seeking to compromise the finality historically accorded consummated reorganization plans and final

discharge orders issued by reorganization and bankruptcy courts.

Stated differently, La Scala-Henning and Conrail seek to pierce the invulnerability of consummated plans of reorganization and/or final discharges in bankruptcy by mandating into perpetuity the right to file claims for post discharge manifested latent injuries allegedly incurred prior to the issuance of such final orders.

At this juncture in the proceedings, it should be noted that although this Court has temporarily enjoined the prosecution of the cases against the discharged Debtor and Erie pending disposition of this controversy, it has not interfered with the rights of La Scala-Henning to pursue their respective personal injury claims against Conrail and/or the manufacturers, distributors and installers of asbestos products which the parties continue to aggressively press. Nor has it interfered with the State of New York from pursuing its property claim against Conrail. Accordingly, the aggrieved parties are not deprived of alternate sources of recovery for their asserted injuries.

Section 77(b) of the former Bankruptcy Act (formerly 11 U.S.C. §205(b)) provides the point of departure for this court's analysis of the issues here in question. That section reads in part as follows:

Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, . . . and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and if filed, whether or not approved, including creditors who have not, as well as those who have accepted it . . . The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as

may consistently with the provisions of the plan be reserved in the order confirming the plan . . . Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. . . .

The quoted seminal legislative pronouncement explicated the classically accepted purpose of the Bankruptcy Act as the vehicle for providing the discharged Debtor with a fresh start. This articulated Congressional design was succinctly set out by the Court of Appeals for the Sixth Circuit in its frequently cited opinion interpreting the purpose of a substantially similar provision in another Section 77 proceeding:

The provisions for reorganization could not be realized if the discharge of debtors were not complete and absolute . . . [If] courts should relax the provisions of the law and facilitate the assertion of old claims against discharged and reorganized debtors, the policy of the law would be defeated . . . [C]reditors would not participate in reorganizations if they could not feel that the plan was final . . . [I]t would be unjust and unfair to those who had accepted and acted upon a reorganization plan if the court were thereafter to reopen the plan and change the conditions which constituted the basis of its earlier acceptance.

Duryee v. Erie Railroad Company, 175 F.2d 58, 63 (6th Cir.), cert. denied, 338 U.S. 861 (1949).

The court's announcement in *Duryee* underscored the fundamental premise that the complete and absolute discharge of the Debtor was the keystone to the credibility of the Bankruptcy Act which prompted the Debtor, its creditors and security holders to accept material and detrimental changes of position to consummate a plan of reorganization. To conclude otherwise would have forever destroyed the full faith and credit of the Act by decimating the incentive of certainty and finality upon which debtors, their creditors and security holders of necessity were required to rely and continue to rely under the new Code.

Indeed, the Supreme Court on numerous occasions has stated that one of the primary purposes of the Bankruptcy Act was to afford debtors "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." *Perez v. Campbell*, 402 U.S. 637, 648, 91 S.Ct. 1704, 1710-11, 29 L.Ed.2d 233 (1971)(citations omitted). "A salient element in such a reorganization is the discharge of all demands of whatsoever sort, executory and contingent, presently due or to mature in the future." *City Bank Farmers Trust Co. v. Irving Trust Co. et al.*, 299 U.S. 433, 438-39, 57 S.Ct. 292, 295, 81 L.Ed. 324 (1937). In discussing the policy of according the reorganized company a fresh start as against asbestos related tort claims, the Court of Appeals for the Seventh Circuit has posited that "the purpose of allowing contingent claims to be proved and discharged in a reorganization is to make it likelier that the bankrupt firm can emerge from the reorganization with fair prospects of success, unhampered by the overhanging threat of liability for claims that had not been discharged. . . ." *In re Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 756 F.2d 508, 523 (7th Cir. 1985)(citations omitted). If a final bankruptcy order were to be reopened to permit claims of the type here asserted, and again reopened each time a new claim is asserted "final decrees and the courts which render them would know no rest, and the policy of the Reorganization Act to launch the reorganized corporation upon a new business life undisturbed and unembarrassed by claims against its predecessor would suffer a serious defeat." *Duryee v. Erie R. Co.* 91 F. Supp. 1009, 1012 (N.D. Ohio 1950), *aff'd*, 191 F.2d 855 (6th Cir. 1951)(memorandum), *cert. denied*, 342 U.S. 948 (1952).

Section 3.04 of the Consummation Order here in issue, in compliance with the dictates of the Act, provided finality to all past, present and contingent future claims against the Debtor and Erie and discharged them from all debts, obligations, liabilities and claims.

This court is mindful of the recent decision of the United States Court of Appeals for the Third Circuit in *Schweitzer v.*

Consolidated Rail Corporation (Conrail) and the Reading Company, et al., 758 F.2d 936 (3rd Cir. 1985), which reversed two trial court decisions addressing analogous issues as here presented. Prior to examining the logic of the circuit court's reasoning in that decision, this court is prompted to momentarily digress and review the direct and lucid analysis of the trial court in those proceedings which confronted issues identical to those of the case at bar.

The District Court for the Eastern District of Pennsylvania barred similarly situated parties from reopening confirmed immutable Plans of Reorganization by anchoring its decision upon the essential elements of certainty and finality integral to all discharges in bankruptcy. *Schweitzer v. Consolidated Rail Corp.*, 36 Bankr. 469 (E.D.Pa. 1984), *rev'd*, 758 F.2d 936 (1985). In its disposition, the trial court summarized by favorably quoting from the identical case of *In re Central Railroad Company of New Jersey*, 38 Bankr. 686 (D.N.J. 1983), wherein that court stated:

Allowance of the claims asserted here and those that would likely follow in the future, would have a substantial impact upon the reorganized company. Furthermore, to permit the estate to be reopened each time a new claim is discovered would preclude any finality to the reorganization proceeding.

In re Central Railroad Company of New Jersey, 38 Bankr. at 689.

The *Schweitzer* trial court thereupon proceeded to reason that:

While it may be harsh to those claimants whose injuries did not become manifest until after the debtor's estate was closed, their claims cannot be heard. This result is inescapable due to the need to be consistent with the expectations of the creditors and stockholders who participated in the reorganization.

Schweitzer, 36 Bankr. at 472.

Thus the immutable finality accorded discharges in bankruptcy and/or plans of reorganization by both the *Schweitzer* and *Central Railroad Company of New Jersey* (CNJ) trial courts

would foreclose all pre and post consummation order claims including contingent or "future" claims of the type advanced by La Scala-Henning and Conrail.

Returning to the assessment of the Third Circuit's opinion in *Schweitzer*, this court's attention is initially directed to the inescapable conclusions conceded by the court:

Section 77(b) in pertinent part provides that a plan of reorganization "shall include provisions modifying or altering the rights of creditors." "Creditors" include "all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this [Act]." "Claims" include "debts, whether liquidated or unliquidated . . . , or other interests of whatever character." 11 U.S.C. §205(b) (repealed 1978).

Section 77(f) provides that confirmation of the reorganization plan is binding upon "all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it." Moreover, if the plan so provides,

[t]he property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities.

11 U.S.C. §205(f) (repealed 1978).

The quoted statutory language clearly provides broad authorization for the discharge in bankruptcy of claims against the debtor in order to secure a fresh start for a company resulting from a section 77 reorganization. It is equally clear that plaintiffs' rights only could have been affected by

the discharge of all "claims" against their employer if they had "claims" within the meaning of section 77 prior to the consummation date of their employer's reorganization.

Schweitzer, 758 F.2d at 941.

Having acknowledged the sweeping scope and inclusiveness of the terms "claim" and "creditor" within the context of Section 77 of the Act, the circuit court proceeded to severely constrict its application of the Act and reasoned that the plaintiffs' FELA causes of action, to come within the orbit of "dischargeable" claims under Section 77, had to exist prior to the relevant consummation date. Although it further acknowledged that under certain circumstances a cause of action could "exist" before it "accrued", it concluded that these FELA plaintiffs had no cause of action prior to final consummation because they did not at that time have compensable injuries pursuant to general principles of tort law. It articulated the above conclusion while recognizing that the term "claim" as defined in Section 77 "included debts, whether liquidated or unliquidated, securities . . . , liens or other interests of whatever character" and that the term "Creditors" included "all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act . . ." *Id.*³

3. It is interesting to note that the definition of "claim," when read together with the definition of "creditor" under Section 77, is identical in substance to the definition of "claim" found in Chapter 10, Section 106(1)(former 11 U.S.C. §506), dealing with corporate reorganizations. The definition in the latter section has been construed as "sweeping in scope":

Within its purview is any character of a claim against the debtor or its property, whether or not such claim is provable under §63 of the Act, and whether secured or unsecured, liquidated or unliquidated, fixed or contingent. This is, of course, a more inclusive definition than that applicable in ordinary bankruptcy, and it should be given a broad construction with respect to claims and creditors in order to dispose of all liabilities of the debtor in reorganization.

In Re Stirling Homex Corp., CCH Bank. Dec. ¶66,850 (2d Cir. 1978), quoting 6 Collier on Bankruptcy ¶2.05, at 306 (1978).

It went on to state further that without a legal relationship between tortfeasor and tort victim there could not be any cognizable "interest" under Section 77. Consequently, there could be no legal relationship between Reading and Central Railroad Company of New Jersey (CNJ) and their employees-plaintiffs relevant to the employees' future tort actions from which a Section 77 "interest" could flow.

Thus, by emphasizing the injury element of the FELA tort claims and ignoring the express definitions of "claim" and "creditor", and further by mandating the manifestation of injury as a prerequisite to the existence of a "claim" or "right" cognizable in bankruptcy, the Third Circuit literally read into the Section 77 definitions of "claim" and "creditor" the provability and "right to payment" requirements that had been expressly deleted from those definitions.

The Third Circuit cited to four factors as support for its analyses and conclusions. In discussing factors one and two, it noted that the defendants in *Schweitzer* failed to cite a single opinion, other than the district court opinions in those cases, holding that a tort cause of action as yet nonexistent under applicable tort law is a contingent claim within the meaning of the Bankruptcy Act or Bankruptcy Code. However, the court then attempted to distinguish and discount the Second Circuit decision interpreting Section 77(b) of the Bankruptcy Act in *In re Radio-Keith-Orpheum Corp.*, 106 F.2d 22 (2d Cir. 1939), *cert. denied*, 308 U.S. 622 (1940), as not controlling in *Schweitzer*. It stated that in *In re Radio-Keith-Orpheum Corp.*, although there had been no breach of the controversial lease agreement there in issue and thus no existing cause of action pursuant to the guarantees in the lease, there was a guarantor-guarantee legal relationship from which an interest in the guarantee could flow. This was purportedly in contrast to *Schweitzer*, wherein the court concluded the plaintiffs had no "interests" of any character before injury manifested itself since there was no legal relationship as between the tortfeasor and a tort victim until the tort had actually occurred. The argument, however, ignores the statutory "legal relationship" imposed by the FELA upon former railroad employers to provide their employees with a safe place to work.

The analogous legal relationship imposed by the FELA undermines the very foundation of the Third Circuit's statement that in contrast to the private guarantee arrangement in *In Re Radio-Keith-Orpheum Corp.* (holding such arrangement created a cognizable "interest" under Section 77(B)), railroads and their employees had no statutory "legal relationship." Since railroad employees "bargained" for a safe place within which to work free of negligence, and this was guaranteed by the employer, there did in fact exist a legal relationship from which an interest could flow.

Third, the circuit court cited to the congressional intent as support for its conclusions. This court's research has been unable to surface even an inferential indication for the circuit court's statement. The Court's statement addressing congressional intent appears to be sheer conjecture.

Fourth, the circuit court's reliance upon *Mooney Aircraft Corp. v. Foster*, 730 F.2d 367 (5th Cir. 1984) is misplaced. In *Mooney*, wrongful death actions were commenced against the ultimate purchaser of the debtor's assets, some five years after the first transfer of those assets, under a theory of common law successor liability. The Fifth Circuit concluded that absent a "provable" claim by the plaintiff under Section 63 of the Bankruptcy Act, the bankruptcy court was without jurisdiction to enjoin the plaintiffs from pursuing actions against the successor corporation. Since, as previously set forth, the provability requirement of Section 63 of the Act was discarded in Section 77, *Mooney* is not relevant to the analysis of the propriety of permitting La Scala-Henning to pursue claims against Erie. Section 77 does not require a claimant to demonstrate a "right to payment" to support a claim. All that is required is that the claimant have a cognizable interest regardless of whether the underlying claim is contingent or in futuro and regardless of its provability during reorganization.⁴

4. This court does not place the same reliance upon *Atellino & Bienes v. M. Frenville Co., Inc. (In re M. Frenville Co., Inc.)*, 744 F.2d 332 (3d Cir. 1984), as is accorded that citation by both the Third Circuit in *Schweitzer* and by Conrail in its brief.

Initially it should be noted that *In re M. Frenville Co., Inc.* arose under

In contrast to the conclusions in these cases, a number of courts have affirmatively decided that in asbestosis cases future claimants have an "interest" in bankruptcy proceedings of sufficient magnitude to warrant the appointment of a representative to protect their "interests" by the bankruptcy court. In *In re Johns-Manville Corp.*, 36 Bankr. 743, 753, the court, in considering the right of future asbestosis claimants to be declared "parties in interest" so as to permit their participation in ongoing reorganization proceedings stated:

In the instant case, this comprehensive definition of bodily injury covering mere exposure militates in favor of a declaration that those who have been exposed to asbestos prepetition and have manifested or will manifest disease post petition are parties in interest to this reorganization case.

Thus, this policy underlying the finding that mere exposure triggers coverage likewise militates in favor of a declaration that future claimants are parties in interest.

The reasoning in *In re Johns-Manville Corp.* is in harmony with the Third Circuit's decision in *In re Amatex Corp.* 755 F.2d 1034 (3rd Cir. 1985), wherein the Third Circuit reversed the district court and, in an apparent contradiction of the *Schweitzer* reasoning, recognized the existence of future claimant "interests" in ongoing bankruptcy proceedings:

11 U.S.C. Section 362(a) of the Bankruptcy Code and not under Section 77 of the Bankruptcy Act. The issue in that case was the application of the automatic stay provision of the Code to pre bankruptcy acts of the debtor wherein the cause of action from those acts accrued post petition. (The proceeding was on-going since no final discharge had issued.) The court was not confronted with dischargeability under Section 77 of the Act as in this case. The pivot of the Court's decision turned on the definition of "claims" under 11 U.S.C. Section 101(4). That definition directs that the claimant have a "right to payment" regardless of whether that claim is unliquidated, contingent, immaterial and disputed. The court stated at page 36:

the threshold requirement of a claim must first be met — there must be a "right of payment".

Section 77 of the Act required no such condition.

We conclude that future claimants are sufficiently affected by the reorganization proceedings to require some voice in them. Moreover, none of the parties currently involved in the reorganization proceedings have interests similar to those of future claimants, and therefore future claimants require their own spokesman.

The court continued:

Moreover, by terming future claimants parties in interest we do not prejudge the difficult questions of whether and how to protect their interests most effectively.

In re Amatex Corp., 755 F.2d at 1042-43.

In its disposition of *Amatex*, the Third Circuit in characterizing future claimants as parties in interest to the reorganization proceedings nevertheless deferred into the future a decision of "whether future claimants can or should be considered 'creditors' under the Code." *Id.* Subsequently, in *Schweitzer* it concluded that such individuals did not have "dischargeable claims" and were not therefore "creditors".⁵ It would appear that the

5. *In re Amatex Corp.*, 30 Bankr. 309 (Bankr. E.D. Pa. 1983), 37 Bankr. 613 (E.D. Pa. 1983), *rev'd*, 755 F.2d 1034 (1985), like *In re UNR Industries, Inc.*, 29 Bankr. 741 (N.D. Ill. 1983), *appeal dismissed*, 725 F.2d 1111 (7th Cir. 1984) is distinguishable from the case at bar in a number of material respects. Initially, both reorganization proceedings were voluntarily commenced by the respective manufacturers of asbestos products in fear of an anticipated proliferation of future asbestos related litigation and the potential liability and legal costs arising as a result thereof which would be beyond the company's ability to manage, control or pay. Secondly, both *Amatex* and *UNR* were being reorganized as ongoing concerns. Thirdly, in both instances the courts were petitioned by the debtors to appoint a guardian to represent the interests of future asbestosis claimants. Fourth, no final order of discharge or consummated plan of reorganization had issued in either proceeding. Lastly, both actions were being conducted pursuant to the present Bankruptcy Code, 11 U.S.C. §101 *et seq.* and not under Section 77 of the Bankruptcy Act §205 which constituted Chapter VII of the Bankruptcy Act.

In both instances the district courts refused to appoint a representative to represent interests of individuals who had in some way been exposed to asbestos and who could eventually seek damages from the debtors for injuries resulting therefrom. In both cases the district courts' opinions evolved from an interpretation of the Bankruptcy Code, particularly 11 U.S.C. §101(4)(A),

existence of future claimant "interests" within Third Circuit pre-

101(9) and 105, and not Section 77 of the Bankruptcy Act. The courts reasoned that under the Code the existence of a claim sounding in tort accrued when an individual suffered injury. Thus, the claim of an asbestos plaintiff did not arise under *state law* until the plaintiff knew or should have known about the injury; consequently since asbestos exposed plaintiffs had no claim under state law for asbestos related diseases until injury became known, they had no cognizable claims under the Bankruptcy Code and were, therefore, not creditors.

In *In re UNR Industries, Inc.*, 725 F.2d 1111 (7th Cir. 1984) the U.S. Court of Appeals for the Seventh Circuit dismissed the appeal for jurisdictional reasons by holding that the order of the district court was not a final appealable order and also failed to qualify under the "collateral order" doctrine created by the Supreme court in *Cohen v. Beneficial Industrial Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).

In its decision the court expressed serious reservation about the lower court's disposition of the matter when it stated:

Even in states where exposed workers are not injured in a tort sense till the disease manifests itself, and therefore do not have an accrued tort claim in any sense, and even assuming that an unaccrued tort claim cannot be a "claim" within the meaning of 11 U.S.C. §101(4)(A) (that is, a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured"), a bankruptcy court's equitable powers (on which *see, e.g. Pepper v. Litton*, 308 U.S. 295, 304, 60 S.Ct. 238, 244, 84 L.Ed. 281 (1939); 1 Remington, A Treatise on the Bankruptcy Law of the United States §22 (Henderson 5th ed. 1950)) just might be broad enough to enable the court to make provision for future asbestosis claims against the bankrupt when it approved the final plan of reorganization. The date on which a person exposed to asbestos happens to develop a diagnosable case of asbestosis is arbitrary. Could it not be argued therefore that a bankruptcy court can and should use its equitable powers, which traditionally "have been invoked to that end that. . . substance will not give way to form, that technical considerations will not prevent substantial justice from being done," 308 U.S. at 305, 60 S.Ct. at 244 (especially, perhaps, in a reorganization case, *see In re Michigan Brewing Co.*, 24 F.Supp. 430 (W.D. Mich. 1938)), to prevent the liquidation or discharge of the bankrupt before provision is made for such persons?

In re UNR Industries, Inc., 725 F.2d at 1119.

As hereinbefore noted, the Third Circuit in *In re Amatex Corp.* reversed the district court and declared that future asbestosis claimants were cognizable parties in interest to the reorganization proceedings.

In commenting upon the logic expressed by the trial courts in *Amatex* and *UNR*, Judge Liffand in *In re Johns-Manville Corp.*, 36 Bankr. 743 (Bankr. S.D.

cedent would materially vary in pre-petition ongoing reorganization proceedings and post discharge final dispositions. The Third Circuit failed to address the apparent contradiction between its decisions in *Amatex* and *Schweitzer*.

In summary, this court is impressed by the comprehensive analysis of Judge Fullam in *In the Matter of Penn Central Transportation Company*, 42 Bankr. 657 (E.D. Pa. 1984), which strikes to the very heart of the issue confronting this court. In that railroad reorganization proceeding the petitioners sought leave of the reorganization court to pursue antitrust actions against the Penn Central Corp. (PCC), the reorganized company which was formed as part of the Plan of Reorganization of the Penn Central Transportation Company (PCTC), the Debtor in Section 77 reorganization proceedings. The court had issued its confirmation of the Plan of Reorganization and its Order of Consummation of the Plan on August 17, 1978, and October 24, 1978, respectively pursuant to Section 77(f) of the Bankruptcy Act.

Notwithstanding the injunctions imposed by the order, and Section 77(f) against suits against PCC, petitioners filed complaints alleging antitrust actions against PCC and others on September 17, 1980 and March 5, 1981. The actions by Pinney Dock and Litton (Petitioners) were founded on conduct of PCTC or its corporate predecessors.

Petitioners' antitrust claims were obviously not satisfied or even considered under the Plan. It was agreed between the parties that the petitioners did not have evidence of the alleged antitrust conspiracy until 1979. The petitioners argued that an

NOTES (Continued)

N.Y. 1984) rejected, out-of-hand, the court's rationale on the issue of dischargeability:

It is the view of this Court that the declarations by Judges Hart and King that these future claims are nondischargeable in bankruptcy are based on superannuated and considerably narrow notions of what constitutes a claim dischargeable in bankruptcy. These notions are at odds with the expanded definition of "claim" contained in Section 101(4) of the Code. . . . Congress specifically intended to afford the broadest possible scope to the definition of "claim" so as to enable Chapter 11 to provide pervasive and comprehensive relief to debtors. 36 Bankr. at 754, n.6.

unknown and undisclosed claim could not have been discharged under Section 77 of the Bankruptcy Act. The district court framed the issue in the following terms:

Petitioners' approach actually raises the issue of the finality of the Confirmation Order: Does this Court have authority to exempt petitioners' antitrust actions or claims from the discharge of §77(f)?

Penn Central, 42 Bankr. at 666.

The court thereupon traced the evolution of Section 77 from the 1947 Supreme Court decision rejecting a railroad debtor's effort to reopen a confirmed plan of reorganization and to modify the plan. *Insurance Group Committee v. Denver & R.G.W.R. Co.*, 329 U.S. 607, 67 S.Ct. 583, 91 L.Ed. 547 (1947). It described the congressional reaction to the Supreme Court decision and the promulgation of P.L. 478 and its relationship to Section 77 of the Bankruptcy Act.

Under P.L. 478, once an order of confirmation became final, the court could not reconsider or modify the plan. Finality of a confirmation order was defined to be expiration of the time within which to take an appeal or exhaustion of appeals which were taken.

Penn Central, 42 Bankr. at 666. The Court thereupon concluded:

When §77 and P.L. 478 are considered together in the context of the finality accorded plans of reorganization and arrangement under Chapters X and XI of the Act, the conclusion which must be drawn is that a §77 plan of reorganization may not be altered once the order confirming the plan becomes final. Even if it is assumed that this court has residual equitable power to permit petitioners to participate under the PCTC's Plan of Reorganization, any potential exercise of that authority at this late date must be considered in the context of the long-standing bankruptcy policy that

confirmation orders are final and the rights of the original participants under the Plan and third parties dealing in reorganization securities must be adequately protected.

Id. at 667.

Judge Fullam's concise disposition of the finality issue is an appropriate summary of the arguments presented by the parties to the case at bar.

La Scala-Henning and Conrail further charge a procedural due process infringement in the form of the Debtor's failure to provide adequate notice of the reorganization proceeding to permit interested parties to be heard. La Scala-Henning, although not claiming a total absence of notice, assert the right to personal notice. Conrail, on the other hand, disclaims notice in any form whether personal or by publication.

The Bankruptcy Act imposed wide discretion upon courts to designate the time and form of notice due with the caveat that such notice and opportunity for hearing be reasonable and appropriate in each case. *In re DCA Development Corporation*, 489 F.2d 43 (1st Cir. 1973). The court, in each instance, is required only to balance the individual's interest against the overall interest of efficient, final resolution of the claims, always mindful of the diminution of the Debtor's assets that may result from delay.

The First Circuit in *DCA* also stated:

Moreover, even where formal notice to affected parties is omitted or is insufficient, informal or constructive notice which provides them with the same opportunity for a fair hearing can satisfy the procedural requirements of the Bankruptcy Act.

Id. at 47.

The conclusions articulated by the First Circuit in *DCA* merely restated the ultimate precedent enunciated by the Supreme Court as early as 1950 in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), which is dispositive of the Fourteenth Amendment due process issue of notice joined herein.

The due process infringement charged by La Scala-Henning, as interpreted by this court, is not the lack of notice but rather the form of the notice. More specifically, these putative claimants insist that only personal notice would have satisfied the constitutional requirements of due process. This contention is inapposite to existing precedent. *Mullane; American Land Co. v. Zeiss*, 219 U.S. 47, 31 S.Ct. 200, 55 L.Ed. 82 (1911). Apart from the foregoing, the putative claimants argue that "No notice issued during the course of the Erie reorganization proceeding was intended to, or did, provide any notice to future claimants that their unknown, unknowable, future claims would be discharged if they did not file proofs of claims." (Brief Conrail, p. 21) The argument infers an affirmative duty on behalf of the Debtor to notice claimants individually of the existence and nature of their claims. Neither Section 77 nor the Bankruptcy Act imposed such a requirement. Moreover, the Supreme Court in *Mullane* repudiated any such duty upon the Debtor to investigate or anticipate possible future claims under circumstances where, as here, the Debtor had no knowledge of the existence of such future claims:

Nor do we consider it unreasonable . . . to dispense with more certain notice to those beneficiaries whose interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge of the common trustee . . . We recognize the practical difficulties and costs that would be attendant on frequent investigations into the status of great numbers of beneficiaries, many of whose interests in the common fund are so remote as to be ephemeral, and we have no doubt that such impractical and extended searches are not required in the name of due process.

339 U.S. at 317-18.

The Bankruptcy Act placed the duty to assert claims squarely upon the shoulders of the claimant.

In the interests of conserving time and space, this court will not review its implementation of the generous provisions of Section 77(c)(7) and related sections of the Act that outlined the proof of claim requirements. Suffice it to say that the procedure adopted and pursued by this court conformed to or exceeded the mandates imposed by law. The liberal procedure was closely monitored by a Special Master appointed by the Court. Apart from soliciting the filing of claims by personal and constructive service, extensive public notice of filing dates and procedures for obtaining simplified standardized forms was widely publicized. Moreover, it is interesting to note that employee interests were effectively protected by the Railway Labor Executives Association (RLEA)⁶ and the Congress of Railway Unions

6. On November 19, 1972 the Railway Labor Executives Association (RLEA) moved this court to intervene as a party in interest to the reorganization, which motion was granted. The RLEA alleged that its intervention was predicated upon the following facts as asserted in its motion:

The individual organizations [hereinafter listed] are the duly recognized representatives under the Railway Labor Act, 45 U.S.C.A. 151 et seq. for a substantial number of all railroad employees in the United States and have negotiated collective bargaining agreements with individual railroads pursuant to such representation. . . The employees of the Debtor Erie-Lackawanna Railway Company represented by the individual railway labor organizations affiliated with the Association have a substantial property and financial interest in actions which may be taken during the course of the present proceedings. . . The interest of the employees represented by the organizations affiliated with the Association will not be represented by any other party to this proceeding and such employees will be bound by judgments entered herein. The Association therefore submits that the grant of the motion by it and those affiliated organizations which represent employees on [sic] the Debtor Railroad to intervene in this proceeding in representation of interest of the employees of the Debtor Railroad, whose employment is governed by collective bargaining agreements between the Debtor Railroad and such affiliated railway labor organizations, is appropriate. . .

Its listed affiliates are: American Railway Supervisors' Association; American Train Dispatchers' Association; Brotherhood of Locomotive Engineers; Brotherhood of Railroad Signalmen; Brotherhood Railway Carmen of the United States and Canada; Brotherhood of Sleeping Car Porters; Int'l Assn. of Machinists & Aerospace Workers; Int'l Brotherhood of Boilermakers and Blacksmiths; Int'l Brotherhood of Electrical Workers; International Brotherhood of

(CRU)⁷ which tracked the reorganization of the Debtor from the dates of their intervention on November 19, 1972 and March 30, 1973, respectively, to the final consummation of the Plan in November of 1982. During that period of active and aggressive participation in the reorganization of the Debtor by these organizations, nothing foreclosed the initiation of action similar to that approved in *Amatex, supra* and *In re Johns-Manville Corp., supra* designed to protect the future rights of putative asbestos exposed employees before the final discharge of the Debtor and Consummation of the Plan. Such action would have permitted the trustees, creditors, security holders and the Court to consider the potential and magnitude of future claims in the formulation of the Plan and thereby would have insured against

Firemen & Oilers; International Organization Masters, Mates & Pilots of America; National Marine Engineers Beneficial Association; Railroad Yardmasters of America; Railway Employees' Department, AFL-CIO; Sheet Metal Workers' International Association.

7. On March 30, 1973 the Congress of Railway Unions (CRU) moved this court to intervene as a party in interest to the reorganization, which motion was granted. The CRU alleged that its intervention was predicated upon the following facts as asserted in its motion:

The railway labor unions listed above are the legally selected and duly recognized representatives of the majority of all railroad employees in the United States. . . [T]he listed unions have negotiated collective bargaining agreements with virtually all of the railroads in the United States, including the Erie Lackawanna Railway Company. . . The employees of Erie Lackawanna Railway Company represented by the individual railway labor organizations affiliated with the CRU have a substantial property and financial interest in actions which may be taken during the course of the present proceeding. . . The interests of the employees represented by CRU through its member unions will not be represented by any other party to this proceeding and such employees will be bound by judgments entered herein.

The CRU includes as its members the chief executive officers of the hereinafter identified national and international railway unions: Brotherhood of Maintenance of Way Employees; Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers; Express and Station Employees; Hotel & Restaurant Employees and Bartenders International Union; Seafarers' International Union of North America; Transport Workers Union of America; United Transportation Union.

the catastrophic inequities that will arise as a result of post discharge post consummation recognition of such claims. This is especially true in light of the known injurious effects of asbestos exposure during the years before November 30, 1982, as is evidenced by the filing of more than 16,000 legal actions against manufacturers, distributors and installers of asbestos products during the years before August 26, 1982, the date on which Johns-Manville Corp. and its affiliates sought protection under Chapter 11, of Title 11 of the United States Code as a result of this great proliferation of asbestos litigation.

Equally without merit is Conrail's charge of defective notice when it is remembered that on April 1, 1976, most of the Debtor's properties and most of the Debtor's employees were transferred to Conrail. Throughout the restructuring of the northeast railroads, Conrail was an integral part of the reorganization proceeding. As a matter of fact, Conrail's existence was the direct result of the reorganizations of the northeastern railroads including the Debtor.

Under existing circumstances, it is inconceivable that the former employees of the Debtor and Conrail were not aware of the bankruptcy proceedings.

This court concludes that the notice by publication implemented during the reorganization proceedings pursuant to Section 77 of the Bankruptcy Act and the mandates of *Mullane* afforded La Scala-Henning and Conrail the opportunity to appear and be heard and to assert their interests of whatever character during the pendency of the reorganization. Having failed to assert their interests which this court qualifies as claims under Section 77 of the Bankruptcy Act and, therefore, cognizable before the consummation of the Plan, La Scala-Henning and Conrail have lost the opportunity to have those interests evaluated in relation to the many other compelling and competing interests which were asserted during the reorganization.

The proceedings in reorganization having been concluded, the La Scala-Henning and Conrail claims are barred.

Accordingly, this court concludes that:

1. The purpose of Section 77 of the former Bankruptcy Act 11 U.S.C. §205 was to accord finality to reorganizations consummated under the Act.

2. A Section 77 claim "includes debts, whether liquidated or unliquidated, securities . . . , liens or other interests of whatever character" (former 11 U.S.C. §205(b)) and the term "creditor" includes "all holders of claims of whatever character against the Debtor or its property. These definitions include the type of contingent or future claims asserted by La Scala-Henning and Conrail.

3. Claims were required to be filed in Section 77 reorganizations within the time fixed by the reorganization court, subject to the liberal provisions of Section 77(c)(7) for filing late claims. Under Section 77 of the Bankruptcy Act and the Bankruptcy Code, claims which were asserted after confirmation and consummation were discharged and there was no exception made for claims which were unknown to a claimant until after consummation of the Plan.

4. The La Scala-Henning and Conrail "claims" were cognizable during the reorganization proceeding and were discharged by Orders No. 1222 and 1235 issued by this court.

5. After April 1, 1976 the Debtor's limited resources precluded its reorganization as an ongoing business entity and its Plan evolved pursuant to Section 77, as a "liquidating" plan consistent with §601(b)(4) of the Rail Act.

6. On April 1, 1976, the bulk of the Debtor's rail properties were conveyed to Conrail, thereby concluding the Debtor's tenure as an operating railroad.

7. On consummation of the Debtor's Plan of Reorganization, the remaining property of the Debtor was transferred to the reorganized company, Erie Lackawanna Co., free and clear of any claims against that property, and Debtor's liabilities of whatever character were discharged.

8. The alleged tortfeasor Debtor Erie Lackawanna Railway Company no longer exists, and the reorganized company is not a corporate successor to the Debtor in the ordinary sense.

9. The comparative positions between La Scala-Henning and Conrail and those now holding interests in Erie, the reorganized company, and the balancing of those interests must be equated consistently with the policy dictates of Section 77. Any relief accorded to these putative claimants would ultimately prejudice the present owners and creditors of Erie by a diminution and dilution of their interests. Consequently, any relief in favor of the post confirmation putative claimants from the Order of Confirmation would be inappropriate and is denied.

10. No statutory or constitutional defects in the proof of claims program and the form notice implemented by the reorganization court having been demonstrated, the discharge under Section 77 and the Bankruptcy Act is an absolute bar to the post confirmation claims asserted herein.

It is therefore ordered that Erie's petition for declaratory and injunctive relief is hereby granted. Attorneys for Erie shall submit an order in conformity with this decision by not later than June 30, 1985.

IT IS SO ORDERED.

ROBERT B. KRUPANSKY,
United States Circuit Judge
United States Court of Appeals
for the Sixth Circuit
Sitting by designation

Filed July 8, 1985

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

**IN THE MATTER OF
ERIE LACKAWANNA RAILWAY COMPANY,**
Debtor.

In Proceedings For the Reorganization of a Railroad

No. B 72-2838

ORDER NO. 1282

Upon the Petition of Erie Lackawanna Inc. ("Erie") for an Order Granting Declaratory and Injunctive Relief, dated May 2, 1984, (Document No. 3618), and upon the Amended Petition of Erie Lackawanna Inc. for an Order Granting Declaratory and Injunctive Relief, dated November 12, 1984 (Document No. 3621), and the Court having received briefs and having heard oral argument on said Petitions on January 4, 1985, and upon all the further papers filed herein, and the Court having rendered its decision herein, Order No. 1281, filed June 18, 1985,

1. It is hereby ORDERED that Erie's Petition and Amended Petition for declaratory and injunctive relief are granted.

2. It is hereby ADJUDGED and DECLARED that this Court's Orders Nos. 1222 and 1235 (Documents Nos. 3501 and 3526, respectively) discharged the Debtor, Erie Lackawanna Railway Company ("Debtor"), and the Debtor's Trustees ("Trustees") from all obligations, debts, liabilities, and claims of whatever character, including tort and other claims in which the injury or damage did not become manifest until after the entry of Orders Nos. 1222 and 1235, and specifically including, but not limited to, the claims and third party claims asserted against the Debtor, the Trustees

and Erie in the following actions, which are the subject of Erie's Petition and Amended Petition:

a. *LaScala v. Erie Lackawanna Inc., et al.*, Docket No. 84-1395, United States District Court, Eastern District of Pennsylvania;

b. *Henning v. Erie Lackawanna Inc.* Docket No. 84-2558, United States District Court, Northern District of Ohio; Docket No. 84-1396, United States District Court, Eastern District of Pennsylvania;

c. *State of New York v. Consolidated Rail Corp. v. Erie Lackawanna Inc., et al.*, New York State Supreme Court; Albany County;

d. *Ramey v. Consolidated Rail Corp. v. Erie Lackawanna Railway Company and Erie Lackawanna Inc.*, Docket No. 81-1099-C, United States District Court, Western District of New York;

e. *Starling v. Consolidated Rail Corp. v. Erie Lackawanna Inc., Thomas F. Patton and Ralph S. Tyler, Jr.*, Docket No. L-058104-84, Superior Court of New Jersey, Law Division: Hudson County;

f. *Matthias v. Consolidated Rail Corp. v. Erie Lackawanna Inc., Thomas F. Patton and Ralph S. Tyler, Jr.*, Docket No. L-000479-84, Superior Court of New Jersey, Law Division: Hudson County;

g. *Abrams v. Consolidated Rail Corp. v. Erie Lackawanna Inc., Thomas F. Patton and Ralph S. Tyler, Jr.*, Docket No. L-000302-84, Superior Court of New Jersey, Law Division: Hudson County;

h. *Luskie v. Consolidated Rail Corp. v. Erie Lackawanna Inc., Thomas F. Patton and Ralph S. Tyler, Jr.*, Docket No. L-039631-84, Superior Court of New Jersey, Law Division: Hudson County;

i. *Coughlin v. Consolidated Rail Corp. v. Erie Lackawanna Inc., Thomas F. Patton and Ralph S. Tyler, Jr.* Docket No. L-058154-84, Superior Court of New Jersey, Law Division: Hudson County; and

j. *Walsh v. Consolidated Rail Corp. v. Erie Lackawanna Inc., Thomas F. Patton and Ralph S. Tyler, Jr.*, Docket No. L-060280-84, Superior Court of New Jersey, Law Division: Hudson County.

3. It is further ADJUDGED and DECLARED that by this Court's Orders Nos. 1222 and 1235 Erie Lackawanna Inc. took the Debtor's properties free and clear of claims asserted after Confirmation and Consummation, including the claims referred to in paragraph 2 above, and further including, but not limited to, the claims and third party claims asserted in the actions listed in subparagraphs 2a through 2j above.

4. It is further ADJUDGED and DECLARED that the alleged tortfeasor Debtor Erie Lackawanna Railway Company no longer exists and that the reorganized company, Erie Lackawanna Inc., is not a corporate successor to the Debtor.

5. It is further ADJUDGED and DECLARED that this Court's Order No. 1235, dated November 30, 1982, permanently restrained and enjoined the institution and prosecution, *inter alia*, of any claims against the Debtor, the Trustees and Erie on account of or based upon any right, claim or interest of any kind or nature against the Debtor whatsoever, including tort and other claims in which the injury or damage did not become manifest until after November 30, 1982, and specifically including, but not limited to, the claims and third party claims asserted in the actions listed in subparagraphs 2a through 2j above.

6. It is further hereby ORDERED that the parties to the actions and third party actions against the Debtor, the Trustees and Erie referred to in subparagraphs 2a through

2j above are permanently enjoined from prosecuting those actions and are further permanently enjoined from initiating any actions or third party actions based on the claims underlying the suits referred to in subparagraphs 2a through 2j above. The claimants against the Debtor, the Trustees and Erie are hereby ordered to implement all necessary action to dismiss and/or discontinue with prejudice within thirty (30) days of the date of this Order the actions and third party actions referred to in subparagraphs 2a through 2j above.

IT IS SO ORDERED.

United States Circuit Judge
United States Court of Appeals
for the Sixth Circuit
Sitting by Designation

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 85-3588
85-3610

IN RE:
ERIE LACKAWANNA RAILWAY COMPANY,
Debtor.

ERIE LACKAWANNA RAILWAY COMPANY,
Petitioner-Appellee,

v.

JOHN HENNING; VICTOR LASCALE, (85-3588),
CONSOLIDATED RAIL CORPORATION, (85-3610),
Respondents-Appellants.

Before: KEITH and GUY, Circuit Judges; and BALLANTINE,
District Judge.

JUDGMENT

ON APPEAL from the United States District Court for the
Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the
said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here or-
dered and adjudged by this court that the judgment of the said
District Court in this case be and the same is hereby affirmed.

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It is further ordered that Petitioner-Appellee recover from Respondents-Appellants the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF
THE COURT

John P. Hehman, Clerk

Clerk

A TRUE COPY

Attest:

By _____
Deputy Clerk

ISSUED AS MANDATE:
COSTS:

February 2, 1987
None

[Entered on the docket October 21, 1986]

Filed January 6, 1987
John P. Hehman, Clerk

No. 85-3610
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: ERIE LACKAWANNA RAILWAY COMPANY,
Debtor

ERIE LACKAWANNA RAILWAY COMPANY,
Petitioner-Appellee,

v.

CONSOLIDATED RAIL CORPORATION,
Respondent-Appellant

ORDER

BEFORE: KEITH and GUY, Circuit Judges and
BALLANTINE* United States District Judge

The Court having received a petition for hearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF
THE COURT

John P. Hehman, *Clerk*

* Hon. Thomas Ballantine, Jr. sitting by designation from the Western District of Kentucky

**IN THE UNITED STATES DISTRICT COURT
THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

In the Matter of
ERIE LACKAWANNA RAILWAY COMPANY,

Debtor

In Proceedings for the Reorganization of a Railroad

Bankruptcy No. B72-2838

**PLAN OF REORGANIZATION
OF ERIE LACKAWANNA RAILWAY COMPANY
AS AMENDED TO JULY 12, 1982**

THOMAS F. PATTON
RALPH S. TYLER, JR.

Trustees of the Property of
Erie Lackawanna Railway
Company, Debtor

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**PLAN OF REORGANIZATION OF
ERIE LACKAWANNA RAILWAY COMPANY
AS AMENDED TO JULY 12, 1982**

INTRODUCTION

The Plan of Reorganization of Erie Lackawanna Railway Company (hereinafter "EL") as amended to July 12, 1982 (hereinafter "the Plan" or "the 1982 Plan") reflects two major developments that have occurred since the filing of the Amended Plan of Reorganization dated November 15, 1979, as heretofore modified by filings in Court (hereinafter "the 1979 Plan").

First, there have been several settlements of claims against the EL estate, arrived at in the context of the 1979 Plan, which settlements require modifications, some substantive and some mechanical, of the 1979 Plan. In many cases, the changes of the 1979 Plan which these settlements require have been approved by the Reorganization Court, subject to its later approval of the Plan as a whole.

Second, EL has settled its claim in litigation (hereinafter "the Valuation Case") under the Regional Rail Reorganization Act of 1973, as amended (hereinafter "the Rail Act") for the value of its properties required to be conveyed in 1976 to Consolidated Rail Corporation (hereinafter "Conrail") and others. By reason of the settlement, EL received on February 25, 1982 a total of \$361,128,421 in cash, consisting of \$229,007,090 constituting principal¹ and \$132,121,331 constituting interest.² The tax con-

1. Of this amount, \$414,138 had been deposited in 1976 in the Special Court established under the Rail Act for the account of EL, of which \$103,534 had been released to EL and retained in a special interest bearing account, pending disposition of the Valuation Case. The interest earned on the amount deposited in the Special Court, as well as the interest on the portion previously released to EL, is included in the amount of interest stated in the text as being received on the settlement.

2. The settlement provided for receipt of additional cash on account of the properties of two majority-owned subsidiaries in the EL System, hereinafter referred to as R&GV and L&WV, as follows: Principal: R&GV \$789,820 L&WV \$203,090; Interest: R&GV \$455,542; L&WV \$117,136. It is anticipated that as soon as practicable R&GV and L&WV will be liquidated in accordance with

sequences of this settlement remain to be determined, but it is probable that federal income taxes will be payable on account of the interest received. Accordingly, a portion of the proceeds must be reserved for possible tax liability.

By reason of the limited amount of cash which EL could generate from assets not conveyed under the Rail Act, the 1979 Plan contemplated that the great bulk of the claims against the estate would be paid in securities, to be redeemed after consummation of that Plan primarily out of the proceeds of the Valuation Case. It was thus assumed that such proceeds would not be received before the 1979 Plan would be put into effect, and it was further assumed that such proceeds would be in the form of securities not required to be redeemed before the end of 1987. Accordingly, a rather elaborate capitalization was provided for, resulting in three series of Senior Notes issuable to holders of various administration or other priority claims, three series of General Reorganization Bonds issuable to holders of pre-bankruptcy bonded debt, a series of Subordinated Notes issuable against a portion of State and Local Tax Claims, four classes of Preferred Stock issuable to holders of pre-bankruptcy bonded debt, with shares of the junior most class of Preferred Stock also being issuable to holders of general unsecured pre-bankruptcy claims, and New Common Stock issuable to the holder of EL's existing common stock. Priorities for payment, as among themselves, of the Senior Notes, General Reorganization Bonds, Subordinated Notes and Preferred Stock were established by the terms of the 1979 Plan.

The recent settlement of EL's claim in the Valuation Case and resultant receipt of cash therefor permits substantial simplification of the capital structure. The 1982 Plan provides for the payment of the majority of the creditors' claims in cash in full, with the balance of the total claims requiring satisfaction in new securities. Thus no Senior Notes or General Reorganization Bonds will need to be issued. There may also be sufficient cash

applicable law. Estimates of the amounts that EL as a stockholder of R&GV and as a creditor and a stockholder of L&WV will receive are included in the summary of anticipated receipts from EL's Asset Disposition Program shown on Exhibit F herein.

by Consummation Date to permit payment in cash in full in lieu of the issuances of the Notes referred to in the next paragraph, in which event it is provided in the 1982 Plan that such payment in cash will then be made. (See Section 7.4 hereof.)

In determining for the 1982 Plan which claims are to receive cash in full and in determining the amounts of partial payment in cash of other claims, the priorities as to payment which had been contemplated for the new securities that would have been issued under the 1979 Plan have been adhered to. Similarly, those priorities are observed in the provisions of the new securities which are proposed to be issued under the 1982 Plan. The new securities to be issued, in lieu of the various classes of Preferred Stock and the Subordinated Notes that had been provided for the 1979 Plan, are as follows: Reorganization Notes (hereinafter, the "Reorganization Notes" or the "Notes") in substitution for the previously designated Class C Preferred Stock; and Capital Stock in lieu of the previously designated Class D Preferred Stock. It now appearing that the existing common stock is without value, the holder thereof will receive nothing under the 1982 Plan.

Payment of Claims to be paid in full or in part in cash and payment of the Notes, all in accordance with the provisions of the Plan, will be secured by the Master Trust Agreement to be established as of the Consummation Date as provided in Section 3.7 of the Plan. The security to be provided for this purpose will consist of all cash and cash equivalents including that derived from the settlement of the Valuation Case and from the Asset Disposition Program, and income from the investment thereof, but will not include Working Capital and interest or other income thereon.

The general program of activities to be carried on by the Reorganized Company will be to liquidate its remaining assets as expeditiously as practicable, to invest undistributed cash proceeds, to resolve the amounts and priorities of those claims against EL still in dispute or in litigation, to resolve by litigation or negotiation the tax liability with respect to the proceeds of the Valuation Case, and to distribute assets to the extent available and required to retire the Notes.

Thereafter, the Reorganized Company will distribute any remaining assets on a complete liquidation of the Reorganized Company in accordance with applicable law, which may be effected through a single liquidating distribution or by the payment of one or more partial liquidating dividends, as the Board of Directors of the Reorganized Company shall determine; provided, however, that if all of the Notes have been retired the Reorganized Company, in lieu of liquidation, may continue in operation for such business purposes as the holders of the Capital Stock may determine, if the holders of 75% of the issued and outstanding shares thereof shall so approve, and if provision is made for the purchase by or on the order of the Reorganized Company of the shares of the holders of Capital Stock who have not voted in favor of such action, at the appraised value thereof determined as provided in Section 4.7 of this Plan.

SUMMARY OF 1982 PLAN

The Plan will be consummated on such date as may be approved by the Court. It is assumed for the purposes of the Financial Exhibits hereto that the Consummation Date will be October 1, 1982.

The Plan contemplates the following treatment of the following categories of valid Claims:

1. Conrail and/or USRA Claims Under Section 211(h) of the Rail Act

Under the Plan, these Claims, relating to pre-conveyance obligations of the Debtor incurred during the Post-Bankruptcy Period, to the extent undisputed, will be satisfied by payment in cash in full. Pursuant to Court approvals, about \$10,821,000 of such Claims have been paid or are otherwise being discharged, and it is expected that a position will be filed seeking approval of early payment (i.e., prior to Consummation of the Plan) of the balance of such Claims as are not disputed by the Trustees. The United States, USRA and Conrail have agreed that the Plan may be consummated without the prior adjudication or settlement of the amount or treatment of the Disputed Section 211(h) Claims, but cash will be reserved for the payment thereof against the

possibility that such claims may be held to be valid and entitled to priority. Shares of Capital Stock will also be reserved against the possibility of a determination to satisfy some or all of such Claims therewith.

2. Claims of State and Local Taxing Authorities

The Plan provides that these Claims will bear simple interest at the applicable statutory rates, or at 6% per annum if no rate is provided by statute, but no penalties are allowed. The Claims will be satisfied by payment in cash in full.

3. "Trust Fund" Claims, Administrative Per Diem Claims and Six Months Claims

In previous formulations of the Plan provision was made for possible "trust fund" claims of other railroads, and for the payment in full in cash of such claims if their entitlement to "trust fund" status was approved by the Court. As a result of a settlement agreement with a group of such railroads, known as the Committee of Interline Railroads, approved by the Court in Order No. 1075, the Trustees have paid \$1,014,000 and assigned to the Committee the Debtor's pre-bankruptcy claims against members of the Committee in the amount of \$1,278,000 in full satisfaction of such claims of the members of the Committee. In essence, that settlement acknowledges the entitlement to "trust fund" status of claims of other railroads for freight and passenger revenues collected by EL for their account in the Pre-Bankruptcy Period. That settlement also includes the acceptance by the Committee of the treatment of Six Months Claims and Administrative Per Diem Claims hereinafter provided for. The claims of railroads other than the Committee members for treatment as Six Months Claims and Administrative Per Diem Claims will be given comparable treatment and their "trust fund" claims, to the extent acknowledged as such by the Trustees or the Reorganized Company, have been or will be paid in cash in full, all subject to the provisions of the Plan, including, without limitation, Section 8.1. Certain holders of Six Months Claims who had objections to prior formulations of the Plan have entered into a settlement agreement accepting the treatment herein provided for such Claims, which settlement has been approved by the Court in Order No. 1076.

4. Other Administration Claims

The Plan provides that these Claims will be paid in full. Those Claims falling within the category of Reorganization Expenses will also be paid in full in cash.

5. Secured Creditors' Claims

Under the Plan, these Claims, represented by seventeen different mortgages and indentures will be satisfied by the payment of cash and securities of the Reorganized Company, all as determined in reference to the extent to which the Claims are deemed to be "secured" or "unsecured." The calculation of, the extent to which the Claims are deemed "secured" is based on the amount of the "assets and credits backing each mortgage and indenture, the most significant of which, in most cases, were the assets conveyed under the Rail Act.

Based on such calculations and upon certain other assumptions as to the amounts available for payment or redemption of the Notes, the Plan provides for the payment to Secured Creditors of cash and securities as shown on Exhibit D hereto (which Exhibit is to be updated as provided in Section 4.2 of this Plan). The principles behind and the method of this allocation are set forth more fully in said Section. See also Section 7.4 hereof.

6. Unsecured Creditors' Claims

Under the Plan these Claims will be paid in Capital Stock.

7. The Stockholder

As previously stated, the common stock of the Debtor is worthless and the Stockholder will receive nothing under the Plan.

8. Accrual of Interest on Claims: Date of Issue of Notes

Interest on all interest-bearing Claims, to the extent allowed, which Claims shall have been finally allowed, settled or adjudicated prior to the applicable Distribution Date, will accrue through the last day next preceding such Date. The date to which interest, to the extent allowed, on other interest-bearing Claims will accrue will depend upon the agreement reached in any final settlement of such Claims or upon adjudication thereof, as contemplated by Section 8.5 of this Plan, provided, however, that no interest on any Claim payable in part in Notes will accrue beyond the last day next preceding the applicable Distribution

Date. All Notes issuable on or after the Consummation Date in exchange or satisfaction of Claims will be dated as of the applicable Distribution Date.

9. Management

The Board of Directors of the Reorganized Company will be composed of 3 directors; 1 director elected by the holders of the Notes, and 2 by the holders of the Capital Stock; provided, however, that if a determination under Section 7.4 shall have been made, all three directors will be elected by the holders of the Capital Stock, since no Notes will be issued in that event.

Attention is called to the terms and provisions of the securities of the Reorganized Company hereinafter described and to the discussion below of tax matters.

SECTION I

DEFINITIONS

The following terms will have the meanings respectively set forth, unless a different meaning in a specific instance is clearly required by the context:

1.1 **"Administration Claims"** or **"Claims of Administration"**: all Claims pertaining to the administration or operations of the Debtor's estate during the Post-Bankruptcy Period, or otherwise determined by the Court to be properly classifiable as Administration Claims, and Personal Injury Claims.

1.2 **"Administrative Per Diem Claims"**: "Retroactive" per diem claims for the period August, 1969 through August, 1970 which were not disclosed until an Association of American Railroads audit was completed after June 26, 1972 and per diem discrepancy claims which first became incontestable on or after July 1, 1972 and for which a priority has been asserted on proofs of claim duly and timely filed.

1.3 **"Asset Disposition Proceeds"**: the cash proceeds, net of expenses and any taxes, received by the Reorganized Company as a result of the Asset Disposition Program, including:

(a) all proceeds received from the operations of the properties which are included within the Asset Disposition

Program prior to such dispositions, and all proceeds of such dispositions:

(b) proceeds from earnings on or sale of notes, bonds or other consideration received by the Reorganized Company upon such disposition or as a result of reinvestment of such proceeds; and

(c) any cash in excess of the Working Capital of the Reorganized Company including accrued interest thereon received by the Reorganized Company from the Trustees and not otherwise required for the Consummation of the Plan.

1.4 **"Asset Disposition Program"**: the program of the Trustees, the Reorganization Managers and the Reorganized Company to dispose of the Retained Assets of the Debtor, whether in the hands of the Trustees or the Reorganized Company.

1.5 **"Bankruptcy Act"**: former Title 11 of the United States Code, which was replaced effective October 1, 1979 by Pub. L. 95-598, Title I. 92 Stat. 2549. enacted on November 6, 1978.

1.6 **"Capital Stock"**: the capital stock of the Reorganized Company described in Section 4.5 of the Plan.

1.7 **"Certificates of Value"**: certificates issued pursuant to Section 306 of the Rail Act.

1.8 **"Claim(s)"**: claim(s) against the Debtor as defined in Section 77(b) of the Bankruptcy Act.

1.9 **"Conrail"**: Consolidated Rail Corporation, a Pennsylvania corporation organized pursuant to the Rail Act.

1.10 **"Consummation of the Plan"**: the carrying out of all acts and procedures contemplated by the Plan of Reorganization, commencing with the Plan Confirmation Date.

1.11 **"Conveyed Assets"**: properties and securities formerly owned, operated or otherwise controlled by the Debtor and transferred to Conrail and others pursuant to the Final System Plan, excluding the properties so transferred of R&GV and L&WV.

1.12 **"Court"**: the United States District Court for the Northern District of Ohio, Eastern Division, having jurisdiction in the reorganization proceedings of the Debtor.

1.13 **"Date of Final Determination of Tax Liability"**: the date on which the amount of all taxes on or measured by income payable by the Trustees or the Reorganized Company in respect of the taxable years or years in which the Gross Valuation Case Proceeds were received and the Plan Consummation Date occurred has been finally determined.

1.14 **"Debtor"**: Erie Lackawanna Railway Company, a Delaware corporation in reorganization under Section 77 of the Bankruptcy Act in the Court, Bankruptcy Docket No. B72-2838.

1.15 **"Dereco"**: Dereco, Inc., a Delaware corporation, a subsidiary of Norfolk & Western Railway Company and owner of all of the common stock of the Debtor prior to January 5, 1982.

1.16 **"Disputed Section 211(h) Claims"**: the Claims of USRA or Conrail against the Trustees for amounts expended under Section 211(h) of the Rail Act in respect of employee pension plans (funded or unfunded), retirees' life insurance premiums or benefits, and employee labor claims in respect of services performed before June 26, 1972.

1.17 **"Distribution Date"**: the date, within 30 days after the Plan Consummation Date, fixed by the Reorganization Managers in respect of any class of Claims (other than Class A) which shall be the first day on which claimants in such class are entitled to receive the cash and/or securities provided to be distributed to such claimants by this Plan. Different Distribution Dates may be fixed for different classes of Claims.

1.18 **"Erie Convertible Bonds"**: Erie Railroad Company General Mortgage 4½% Income Bonds, Series A, which are convertible into Preferred Stock of Dereco or into Common Stock of N&W and which have not been pledged under any indenture of the Debtor.

1.19 **"Erie Income Debentures"**: Erie Railroad Company Income Debentures due January 1, 2020.

1.20 **"Final System Plan"**: the plan of United States Railway Association, dated July 26, 1975, and, as supplemented, issued pursuant to the Rail Act, which defines the assets required

to be conveyed by the railroads under the jurisdiction of the Rail Act.

1.21 **"Flood Loan"**: unsecured loan made by the Federal Railroad Administrator to the Debtor under the Emergency Rail Facilities Restoration Act of 1972 (P.L. 92-951) and which by agreement is subordinate in right of payment as to both principal and interest to the Claims of all creditors of the Debtor, except the Claims of pre-bankruptcy general unsecured creditors, with which it ranks equally.

1.22 **"Government Guaranteed Loans"**: secured loan made to the Debtor which was guaranteed as to principal and interest by the United States under Part V of the Interstate Commerce Act.

1.23 **"Gross Valuation Case Proceeds"**: the \$360,437,795 received in cash on February 25, 1982 on the redemption of the Certificates of Value together with the other cash then received or deposited in a special account in the amount of \$690,626, a total of \$361,128,421, by reason of the transfer pursuant to the Rail Act to Conrail and others of properties formerly owned, operated or otherwise controlled by the Debtor directly or through subsidiaries, excluding properties of R&GV and L&WV.

1.24 **"Indenture Trustee(s)"**: the trustee(s) under the mortgages and indentures relating to the bonds described in Exhibit D to the Plan.

1.25 **"L&WV"**: Lackawanna & Wyoming Valley Railway Company, a Delaware corporation, 86.42% of the capital stock of which is owned by the Debtor.

1.26 **"Master Trust Agreement"**: a trust agreement for the benefit of holders of Claims in the respective Classes established under the Plan, which are entitled under the Plan to receive cash and/or Notes, if issued, which will be entered into as of the Consummation Date between the Reorganized Company and the Master Trustee and which will provide for a security interest in all cash and cash equivalents of the Reorganized Company transferred, assigned or deposited under the Master Trust Agreement in accordance with the provisions of Section 3.7 hereof.

1.27 **"Master Trustee"**: the trustee to be named under the Master Trust Agreement.

1.28 **"N&W"**: Norfolk & Western Railway Company, a Virginia corporation, which, through its subsidiary, Dereco, was the indirect owner of all of the common stock of the Debtor prior to January 5, 1982.

1.29 **"Personal Injury Claim"**: the Claim of an individual not an employee of the Debtor or of a personal representative of such a deceased individual against the Debtor for personal injury to or death of such individual arising out of the operation of the Debtor during the Pre-Bankruptcy Period.

1.30 **"Plan Confirmation Date"** or **"Confirmation Date"**: the date fixed by order of the Court, as provided in Section 77(e) of the Bankruptcy Act, confirming the Plan.

1.31 **"Plan Consummation Date"** or **"Consummation Date"**: the date fixed by order of the Court on which legal and beneficial title to the assets, claims and rights of the Debtor and the Trustees will be vested in or transferred to the Reorganized Company and within 30 days after which the Reorganized Company will commence distributing cash and issuing or reserving for issuance the securities to be allocated to claimants of the Debtor as set forth in the Plan.

1.32 **"Plan of Reorganization"** or **"Plan"**: this Plan, filed by the Trustees pursuant to Section 77(d) of the Bankruptcy Act with the Court in Bankruptcy Docket No. B72-2838, as it may from time to time be amended, modified or supplemented prior to the Plan Confirmation Date.

1.33 **"Post-Bankruptcy Period"**: the period commencing on June 26, 1972 and ending on the Plan Consummation Date.

1.34 **"Post-Conveyance Period"**: the period commencing on April 1, 1976 and ending on the Plan Consummation Date.

1.35 **"Pre-Bankruptcy Period"**: the period prior to the filing, on June 26, 1972, of the petition for reorganization of the Debtor under §77 of the Bankruptcy Act.

1.36 **"R&GV"**: Rochester & Genesee Valley Railroad, a New York corporation, 69.90% of the capital stock of which is owned by the Debtor.

1.37 **"Rail Act"**: the Regional Rail Reorganization Act of 1973 (P.L. 93-236), 45 U.S.C. §§701-94, as amended to the Plan Confirmation Date.

1.38 **"Reorganization Expenses"**: costs incurred during the Post-Conveyance Period and associated with the preparation, filing, confirmation and consummation of the Plan, or the preparation and filing of earlier versions of the Plan, and other activities incident thereto, and remaining unpaid at the Consummation Date, together with expenses of the Trustees incurred during the Post-Conveyance Period relating to the liquidation of the assets of the Debtor and the prosecution of the Valuation Case and remaining unpaid at the Consummation Date.

1.39 **"Reorganization Managers"**: the Trustees and any person or persons described in Section 6.5 of the Plan as successors to, or in substitution for, them or either of them having responsibility for the interim management, subject to the control of the Court, of the reorganization of the Debtor between the Plan Confirmation Date and the Consummation of the Plan.

1.40 **"Reorganization Notes"**: the debt instruments of the Reorganized Company described in Sections 4.1 and 4.2 of the Plan.

1.41 **"Reorganized Company"**: the corporation (the present Erie Lackawanna Railway Company with appropriate amendments to its certificate of incorporation and by-laws) which is the issuer of and obligor under the securities to be issued as part of the Plan.

1.42 **"Retained Assets"**: all assets of the Debtor other than Gross Valuation Case Proceeds and other than Working Capital of the Reorganized Company.

1.43 **"Section 211(h) Claims"**: Claims arising pursuant to Section 211(h) of the Rail Act in respect of loans made to Conrail for payment of pre-April 1, 1976 obligations of the Debtor to the extent such loans are used for payment of valid Claims of Administration of the Debtor, including interest thereon at the rates charged to Conrail by USRA pursuant to Section 211(h) of the Rail Act. Such Claims include, among others, Claims on account of personal injuries to or death of (i) an employee of the Debtor or of the Debtor's estate either on, before or after June 26, 1972 and (ii) any other individual arising out of the operation of the Debtor's estate on or after such date.

1.44 **"Secured Creditors"**: the holders of secured debt of the Debtor under mortgages and indentures listed in Exhibit D hereto.

1.45 **"Six Months Claims"**: Claims duly and timely filed by Unsecured Creditors, and asserting priority under the so-called six months rule, for materials or services which were essential to the continued operation of the Debtor and were furnished to the Debtor within six months prior to June 26, 1972.

1.46 **"State and Local Tax Claims"**: The Claims of state and local taxing authorities for (a) taxes falling due on or after June 26, 1972 and not paid when due and remaining unpaid, including simple interest hereon at applicable statutory rates, or, if no interest is provided by statute, at the rate of 6% per annum (but excluding penalties and default charges of any nature which will be extinguished), for real estate, franchise, excise and other taxes (including real estate taxes on property held of record by a subsidiary of the Debtor but carried on the books of the Debtor) and (b) taxes falling due prior to June 26, 1972 and not paid when due and remaining unpaid (but excluding interest and penalties and default charges of any nature which will be extinguished), for real estate, franchise, excise and other taxes in respect of which liens shall have been perfected prior to June 26, 1972 (including real estate taxes on property held of record by a subsidiary of the Debtor but carried on the books of the Debtor).

1.47 **"Stockholder"**: the owner of the common stock of the Debtor.

1.48 **"Tax Proceedings"**: all proceedings in any court or other forum, and all proceedings with any officer or agent of the United States or of any State or political subdivision thereof, which may seek to impose any tax on or measured by income of the estate of the Debtor, the Trustees or the Reorganized Company in respect of the taxable year or years in which the Gross Valuation Case Proceeds were received or the Plan Consummation Date occurred, with respect to the validity and determination of the amount of any such tax.

1.49 **"Trustees"**: Thomas F. Patton and Ralph S. Tyler, Jr., not in their individual capacities but solely as trustees of the property of the Debtor and any person or persons appointed or

continued by the Court as successor or successors to or in substitution of them or either of them.

1.50 **"Unsecured Creditors"**: all creditors of the Debtor whose Claims arose during the Pre-Bankruptcy Period and whose Claims are not secured by a lien upon specific assets.

1.51 **"USRA"**: United States Railway Association, a government corporation of the United States established pursuant to Section 201 of the Rail Act.

1.52 **"Valuation Case"**: the proceedings before the Special Court established under the Rail Act captioned In the Master of the Valuation Proceedings under §303(c) and 306 of the Regional Rail Reorganization Act, Special Court, Misc. Docket No. 76-1, involving the issue of compensation or damages for the properties formerly owned, operated or otherwise controlled by the Debtor that were transferred to Conrail and others pursuant to the Rail Act, excluding properties of R&GV and L&WV, or for damages or compensation to the Debtor by reason of rail-related operations or related to the Rail Act prior or subsequent to such transfer, which proceedings were terminated as a result of a settlement agreement approved by the Special Court on January 25, 1982 and consummated on February 25, 1982.

1.53 **"Working Capital"**: the fund established by Section 3.6 of this Plan for the purpose of paying the costs of carrying on the activities, operations and liquidation of the Reorganized Company.

SECTION 2

CLASSIFICATION OF CLAIMS INCLUDING STOCKHOLDER'S INTEREST

For the purposes of this Plan, the classification of Claims (including the Stockholder's interest in the Debtor) is as follows:

2.1 **CLASS A**: Claims for costs and expenses in connection with the reorganization proceedings and this Plan as such Claims may be fixed and allowed by the Court in accordance with the provisions of Sections 77(c)(2) and 77(c)(12) of the Bankruptcy Act, together with Reorganization Expenses not encompassed by

those provisions, and Claims of railroads which are acknowledged by the Trustees or the Reorganized Company as entitled to trust fund status and which relate to the Debtor's operations during the Pre-Bankruptcy Period.

2.2 **CLASS B:** Section 211(h) Claims.

2.3 **CLASS C:** State and Local Tax Claims.

2.4 **CLASS D:** Personal Injury Claims and other Claims of Administration not otherwise included in Classes A, B, C or E.

2.5 **CLASS E:** Administrative Per Diem Claims.

2.6 **CLASS F:** Six Months Claims.

2.7 **CLASS G—1:** Claims of Secured Creditors, including the Government Guaranteed Loan, which will be paid in cash in full, as shown on Exhibit D.

2.8 **CLASS G—2:** Claims of Secured Creditors which will be satisfied in whole or in part by the issuance of securities (the balance, in the case of Claims satisfied in part by securities, being paid in cash), as shown on Exhibit D.

2.9 **CLASS H:** General unsecured Pre-Bankruptcy Period Claims not entitled to priority in accordance with provisions of the Bankruptcy Act, and the Flood Loan Claim.

2.10 **CLASS I:** Claim of the Stockholder.

SECTION 3

DESCRIPTION OF THE REORGANIZED COMPANY

3.1 **The Reorganized Company:** For continuity in the operations of the Debtor and for convenience, simplicity and economy in carrying out this Plan, the present Erie Lackawanna Railway Company, with appropriate amendments to its certificate of incorporation and by-laws, will be the Reorganized Company. The certificate of incorporation, as amended, and the indenture with respect to the Notes will provide that, subject to the provisions of Sections 4.4 and 4.5 so long as any of the Notes are outstanding, the corporate purposes of the Reorganized Company shall be limited to those described in the eighth paragraph of the Introduction to this Plan. The certificate of incorporation, as so amended, will also require the liquidation of the

Reorganized Company, subject to the terms and conditions of Section 4.5 of this Plan.

3.2 Capitalization of the Reorganized Company: The Reorganized Company will be authorized to issue one series of Notes, and one class of Capital Stock. The maximum principal amount of Notes and the maximum number of shares of Capital Stock to be issued in Consummation of the Plan will be determined by reference to the aggregate amount of the Claims for which such issuance will be made as herein provided. See Section 7.4 hereof.

3.3 Vesting of Assets in the Reorganized Company: The Reorganized Company will be vested with, and be the legal and beneficial owner of, all assets and claims held by the Debtor and by the Trustees existing as of the Consummation Date (other than any property interests abandoned by the Trustees with approval of the Court). All cash or other property held under instruments securing obligations of the Debtor, all collateral securing obligations of the Debtor and all segregated or special deposits or funds of any type held by the Debtor, by the Trustees, by the Indenture Trustees, by the Reorganization Managers, or by any other person or held in the registry of the Court, will be delivered, transferred or assigned to the Reorganized Company on or as soon as practicable after the Consummation Date, free and clear of all liens and encumbrances of any kind or character, unless otherwise provided by order of the Court. See Section 3.7 below with regard to establishment of the Master Trust.

3.4. Discharge of Obligations of the Trustees and/or the Debtor: All obligations incurred by the Trustees and/or the Debtor, all Claims against the Debtor, all mortgages, and all other liens and encumbrances on property of the Debtor will, unless the Court directs otherwise in its order confirming the Plan, be discharged upon the Consummation Date, except to the extent provided for in this Plan.

3.5 Reservation of Cash to Meet Possible Tax Liability: The Reorganization Managers shall establish a cash reserve within the Master Trust, in such amount as they shall determine to be prudent, out of the Gross Valuation Case Proceeds

to pay all income taxes that may be payable for the taxable year in which such Proceeds have been received. The Reorganized Company shall continue to maintain such reserve in such amount as the Board of Directors shall from time to time in its sole discretion determine to be necessary for such purpose. Such reserve may be invested in such securities and other investments as shall be provided in the Master Trust Agreement.

3.6 Working Capital: In addition to the reserve provided for in Section 3.5 of this Plan, the Reorganized Company shall initially establish a Working Capital fund of \$6,000,000 from the cash it shall receive on or as of the Consummation Date from the Trustees or the Reorganization Managers, which fund, together with interest or other income thereon, shall be used for the purpose of paying the costs of carrying on its activities and other operations, and of its liquidation subject to the provisions of Section 4.5 of the Plan. Thereafter, the amount of the fund shall be such lesser or greater amount as the Board of Directors of the Reorganized Company shall from time to time in its sole discretion determine to be necessary for such purpose.

3.7 Master Trust Agreement: Effective as of the Consummation Date, the Reorganized Company shall transfer and assign to, and deposit with, the Master Trustee pursuant to the Master Trust Agreement, in trust for the sole purpose of securing and effecting payment, in the following order of priority, of (a) all Claims to be paid in full or in part in cash and (b) the Notes, all of the Reorganized Company's right, title and interest in and to all cash and cash equivalents then or thereafter owned or acquired, including without limitation, (x) all cash on deposit in banking institutions and all investments of Gross Valuation Case Proceeds (and the proceeds of such investments) made pursuant to Order No. 1152, and (y) all Asset Disposition Proceeds, but excluding Working Capital and any interest or other income thereon. The Reorganized Company shall have the unqualified right, at any time and from time to time, upon written requisition therefor, signed by the Reorganized Company, to withdraw moneys from the Master Trust for the purposes of paying (1) all Federal and other taxes (including estimated taxes) payable on account of or in respect of the Gross Valuation Case Proceeds or

otherwise and (2) unliquidated Claims as and when they become liquidated, to meet contingencies (including the possibility of establishment of valid claims not allowed for in the amount of Claims shown on Exhibit A to this Plan), and to replenish Working Capital if the reserve therefor proves inadequate. Additionally, the Reorganized Company, with Court approval, will be entitled to make withdrawals from the Master Trust, from time to time, after retirement of all the Notes, either to make partial liquidating distributions on the Capital Stock, or, if as contemplated by Section 4.5 of the Plan there has been a determination by the holders of the Capital Stock not to liquidate, for any proper business purpose, but, in either case, only to the extent that the amounts then held in the Master Trust shall exceed all reserves required to carry out the Plan. Payments in respect of Claims and the payment or redemption of the Notes pursuant to the Plan will be made either by an Exchange Agent (appointed as provided in Section 7.2 of this Plan) or by the Reorganized Company with funds requisitioned from the Master Trustee in accordance with the written directions of the Reorganized Company. The Master Trust will continue in effect until termination of the right to receive cash or Notes of the Reorganized Company in accordance with Section 8.7 of the Plan or until all Notes have been retired, whichever is later. Moneys in the Master Trust shall be invested in such securities and certificates of deposit as shall be permitted under the Master Trust Agreement, as approved by the Court. All income on such investments shall be added to the funds held under the Master Trust Agreement.

SECTION 4

DESCRIPTION OF SECURITIES TO BE ISSUED BY THE REORGANIZED COMPANY

The securities to be issued by the Reorganized Company pursuant to this Plan will have the general terms and provisions outlined below. The specific terms and forms of the securities, as well as of the related indenture, the certificate of incorporation and the by-laws of the Reorganized Company, will be subject to approval by the Court prior to the Plan Consummation Date.

4.1 Reorganization Notes: The Notes will be general obligations of the Reorganized Company and will be issued only in registered form and in denominations of \$100, \$500, \$1,000 and multiples of \$1,000. The Notes will mature on December 31, 1988 or one year after the Date of Final Determination of Tax Liability, whichever is earlier, and will accrue interest, without compounding, at the rate of 7% per annum. Interest accrued with respect to the Notes will be due and payable only upon the maturity or redemption of the Notes but may be paid earlier and from time to time as the Board of Directors of the Reorganized Company in its sole discretion shall determine. Within 30 days after the end of each calendar year commencing with the year ending December 31, 1983, and until all of the Notes and accrued interest thereon are paid in full, the Reorganized Company (A) shall determine the extent to which the moneys then held under the Master Trust Agreement established pursuant to Section 3.7 of this Plan exceed the sum of (1) the amount required for the payment of all then unpaid Claims which under the provisions of this Plan are required to be paid in full or in part in cash, and (2) the amounts then estimated to be subject to future withdrawal for the purposes set forth in the second sentence of Section 3.7 and (B) shall redeem by lot the Notes, to the extent of such excess amount determined under clause (A) above, at 100% of the principal amount of Notes being redeemed plus accrued interest thereon to the redemption date, all in accordance with the provisions of the Note indenture created pursuant to Section 4.4 of this Plan; provided, however, that no such redemption shall be required to be made if the amount available for such purpose is less than \$100,000, unless the then outstanding unpaid principal amount of Notes and accrued interest thereon shall be less than \$100,000. The Notes will also be redeemable prior to maturity at the option of the Reorganized Company, by lot if less than all redeemed, at par plus accrued interest, all in accordance with the provisions of said Note indenture. To the extent set forth in Section 6.1, the holders of the Notes will be entitled to vote in the election of directors of the Reorganized Company on the basis of one vote per \$100 of principal amount of Notes.

4.2 Reorganization Notes and Capital Stock Issuable and Cash Payable to Secured Creditors—Principles and Method of Allocation: The allocation of cash, Notes and Capital Stock among the Secured Creditors is based upon the degree to which the Claims in respect of bonds issued under the Debtor's various mortgages and indentures are deemed "secured" for purposes of this Plan. The degree of "security" is in turn determined by reference to the amount of "assets and credits" allocated to each mortgage and indenture as compared to the total Claim in respect of each such mortgage and indenture. The "assets and credits" are of six kinds: (1) escrowed funds, consisting principally of proceeds of sales of mortgaged properties; (2) the estimated value of Retained Assets not yet sold (other than securities), including deferred payments on sales previously closed; (3) the Conveyed Assets are more fully discussed below; (4) scrap and salvage credits; (5) rental income credits; and (6) other miscellaneous credits, including the value of pledged securities of other companies.

The 1979 Plan established a structure based on USRA's valuation in 1976 of the Conveyed Assets amounting to about \$55 million. Insofar as the Conveyed Assets portion of the "assets and credits" was concerned, the amount of cash therein provided to be distributed (\$4 million) was based on an assumed recovery at USRA's valuation, while the amount and category of securities therein provided to be distributed was based on incremental possible recoveries in the Valuation Case. USRA's valuation of the Conveyed Assets was not made on a mortgage by mortgage basis. However, the Trustees' own consultants, Wyer, Dick & Co., recognized experts in the valuation of railroad properties, have made, in part through subcontractors, a net liquidation value study which is detailed by mortgage segment and the Trustees understand that such study was performed in conformity with appropriate and accepted methods of appraisal.

In determining the amount of cash, Notes and Capital Stock issuable in respect of the various mortgage issues now outstanding, the following principles were applied in respect of the Conveyed Assets; each multiple of the USRA 1976 valuation of the Conveyed Assets employed in the formula was allocated among

the various mortgages constituting a first lien on Conveyed Assets in accordance with their relative values as determined by the net liquidation value appraisal of the Conveyed Assets made by the Trustees' consultants. Once the Claims of bonds under a first lien mortgage were met in full under the Plan, on the assumptions utilized in developing the structure, the excess value of the Conveyed Assets subject to such first mortgage was assigned, at the next level of possible incremental recovery, to any second mortgage on such Assets. Based upon the figures developed, a portion of Secured Creditors' Claims was to be treated as, in effect, unsecured claims, and to that extent would receive securities of the same class as that issuable to the Unsecured Creditors. It was provided that the calculations would be updated in the manner described in the last sentence of the following paragraph.

No security-holder objected to the methodology employed in the 1979 Plan. Accordingly, that methodology is followed in the determinations herein made as to the cash to be paid and securities to be issued under the 1982 Plan, now that the Valuation Case has been settled. Exhibit D shows for the outstanding bonds under each mortgage or indenture the amount of cash and amount and type of securities that will be distributed under the Plan. The Exhibit assumes a consummation of the Plan in October 1982 and thus reflects current projections on the estate's available cash as of September 30, 1982. Exhibit E shows the amounts that will be received per \$1,000 principal amount of each outstanding bond. The calculations underlying Exhibits D and E, and such Exhibits, will be updated to a date not more than 90 days prior to the Consummation Date in accordance with the methodology utilized by the Trustees and their financial advisor whose determination shall be final.

The assumptions made for the purposes of the structure of the 1979 Plan, and followed in the 1982 Plan, include an assumption that no Federal income tax would be payable on account of the Gross Valuation Case Proceeds, whatever their amount. While the income tax consequences of the settlement of

the Valuation Case cannot presently be determined (see Section 8.14), it is likely that some Federal income taxes will in fact be payable (see Exhibit F hereto).

4.3 Capital Stock: The certificate of incorporation of the Reorganized Company will authorize 1,500,000 shares of Capital Stock without par value. The Capital Stock will be issued as provided in the Plan. The holder of any claim entitled to receive Capital Stock will receive one share for each \$100 of claim. The holders of the Capital Stock will not be entitled to any dividends or other distribution, nor may shares of Capital Stock be purchased by the Reorganized Company, until such time as all Notes have been paid or redeemed by the Reorganized Company. Shares of Capital Stock may not be purchased by the Reorganized Company except on an offer or offers to purchase made to all stockholders. As more fully set forth in Section 6.1, the holder or holders of the Capital Stock will be entitled to vote in the election of directors of the Reorganized Company.

4.4 The Indenture: Subject to the approval of the Court, an indenture will be entered into for the Notes providing for the rights of the holders thereof. The indenture will contain covenants prohibiting the Reorganized Company from creating any liens upon any of its property other than the Master Trust referred to in Section 3.7 hereof, changing its corporate purposes or incurring or assuming any liabilities except in the ordinary course of business and except liabilities and expenses incurred in carrying out the terms and provisions of the Plan and the indenture; provided, however, that nothing in any such indenture shall prevent the issue by the Reorganized Company after the Consummation Date of any Notes, or of Capital Stock, required to carry out the provisions of the Plan or any order of the Court relating thereto. The indenture will include appropriate covenants relating to redemption procedures, financial and reporting matters, and will contain appropriate provisions relating to default remedies and other matters. The indenture will contain provisions acknowledging the right of the Board of Directors to increase the tax reserve of the Reorganized Company as provided in Section 3.5 of the Plan, and the Working Capital of the Reorganized Company as provided in Section 3.6 of this Plan.

The indenture will also contain provisions requiring that, subject to payment or provisions for payment of Claims entitled to priority over Claims being satisfied by the issuance of the Notes, the Reorganized Company apply Asset Disposition Proceeds and Gross Valuation Case Proceeds solely to the payment or redemption of the Notes, except to the extent the Asset Disposition Proceeds and Gross Valuation Case Proceeds shall have been required to be devoted to the payment of expenses of the character set forth above.

Under the terms of the indenture, the Reorganized Company will be restricted from purchasing any shares of Capital Stock and making any payments by way of dividends or otherwise to the holders of the Capital Stock until all Notes have been paid, redeemed or purchased by the Reorganized Company.

4.5 Certificate of Incorporation: Subject to the approval of the Court, the certificate of incorporation of the Reorganized Company will be amended to include provisions consistent with the requirements of Section 4.3, 4.4 and 6.2 of this Plan. The certificate of incorporation of the Reorganized Company shall also require the Reorganized Company, except as hereinafter provided, to be completely liquidated after all Notes have been paid or redeemed by the Reorganized Company and all other obligations of the Reorganized Company under the Plan or otherwise have been paid or provided for. Such liquidation shall be effected, subject to applicable Delaware law, in such a manner as the Board of Directors shall determine, through a single liquidating distribution or through payment of partial liquidating dividends. Notwithstanding the foregoing, the Reorganized Company may continue in business after the payment or redemption of all Notes and payment or provision for payment of such other obligations, as aforesaid, for such business purposes as the holders of the Capital Stock may determine, if (1) the holders of at least 75% of the issued and outstanding shares of Capital Stock, at a meeting of stockholders duly called and held for such purpose, shall approve a proposal amending the certificate of incorporation of the Reorganized Company to provide for such continuance and setting forth such business purposes, and (2) any holder who has not voted in favor of such proposal shall be

entitled to the appraisal rights provided in Section 262 of the General Corporation Law of the State of Delaware, or in any comparable future provisions of said law, upon complying, as nearly as is practicable, with the procedures set forth in subsections (d) and (e) of said Section 262. Upon determination by the Delaware Court of Chancery of the stockholders entitled to appraisal of their shares, and of the fair value of such shares (together with fair rate of interest, if any, to be paid thereon) the Reorganized Company shall pay or cause to be paid to such stockholders such amounts as shall be so determined by said Court of Chancery.

SECTION 5

TREATMENT OF CLAIMS INCLUDING STOCKHOLDER'S INTEREST

The treatment of Claims against the Debtor, including the Stockholder's interest, will be generally as set forth in this Section 5, and as detailed in Exhibits A, D, E and F attached to this Plan. Interest on all interest-bearing Claims, to the extent allowed, in the case of Claims which shall have been finally allowed, settled or adjudicated prior to the applicable Distribution Date, will accrue through the last day preceding such Date. The date to which interest, to the extent allowed, on other interest-bearing Claims will accrue will depend upon the agreement reached in any final settlement of such Claims or upon the adjudication thereof, as contemplated by Section 8.5 of the Plan, provided, however, that no interest on any interest-bearing Claims payable in part in Notes will accrue beyond the last day preceding the applicable Distribution Date. With regard to those classes of Claims which are payable in whole or in part in Notes or Capital Stock, such Claims will be paid on the basis of a Note in the principal amount of \$100 or one share of Capital Stock, for each \$100 of Claim. The treatment of fractional interests shall be as follows: in the case of any Claim to be satisfied by the issuance of Notes and Capital Stock of the Reorganized Company, the portion to be satisfied by the Notes shall be rounded to the nearest \$100 (rounding upward if the portion exceeds the

next lower multiple by \$50 or more) provided that if this results in a rounding upward, the difference between \$100 and the amount rounded shall be subtracted from the remainder of the Claim, and if the rounding is downward, the amount rounded shall be included in the remainder of the Claim; and this rule shall be applicable in the determination of the amount of Capital Stock to be issued. Subject to the foregoing, any portion of any Claim which remains unsatisfied after the issuance of the appropriate principal amount of Notes, or shares of Capital Stock, and which is less than \$50, will be cancelled; provided, however, that if such remainder is \$50 or more, it will be satisfied by the issuance of an additional Note in the principal amount of \$100, or an additional share of Capital Stock, as appropriate.

5.1 CLASS A: These Claims shall be paid in cash on or before the Consummation Date, or as soon as practicable thereafter.

5.2 CLASS B: If not already discharged, these Claims to the extent undisputed will be paid in cash in full. Pursuant to approvals of the Court, about \$10,821,000 of these claims have been paid or are otherwise being discharged, and a petition will be filed seeking authority to pay the balance of undisputed Section 211(h) Claims in cash in full before Consummation of the Plan. Cash and/or Capital Stock shall be reserved in the case of Disputed Section 211(h) Claims and other Section 211(h) Claims not yet audited and acknowledged by the Trustees.

5.3 CLASS C: These Claims will be paid in cash in full.

5.4 CLASS D: These Claims will be paid in cash in full.

5.5 CLASS E: These Claims will be paid 25% in cash and the remainder by the issuance of Capital Stock.

5.6 CLASS F: These Claims will be paid 50% in cash and the remainder by the issuance of Capital Stock. Pursuant to paragraphs 5(b) and 5(c) of the settlement agreement between the Trustees and the Committee of Interline Railroads, approved by the Court in Order No. 1075, the cash to which one Committee member would otherwise be entitled will be reduced by \$75,000 and the number of shares of Capital Stock to which that member would otherwise be entitled will be reduced by 250.

5.7 CLASS G—1: These Claims will be paid in cash in full. See also second paragraph of Section 5.8 hereof.

5.8 CLASS G—2: These Claims will receive payment in cash and/or Notes and/or Capital Stock all as set forth in Exhibits D and E hereto (as the same shall be updated as provided in Section 4.2 of this Plan), subject to the rounding computations described in the introduction to this Section 5, except that to the extent such Claims consist of Claims for fixed interest falling due during the Pre-Bankruptcy Period, such Claims will be satisfied, in any case when the holder of obligations to which such interest relates are entitled to receive any cash on account of the principal of such obligations, by the payment of cash, or, in any other case, by the issuance of securities of the most senior series or class to which the holders of such obligations may be entitled. See also (a) the last two sentences of the following paragraph and (b) Section 7.4 of this Plan.

For each \$1,000 bond outstanding in each series of existing bonds, the amount of Claim payable in cash and the amount of Notes and/or Capital Stock issuable are shown in Exhibit E, the amount of cash and the amount of each new security being rounded down to the nearest dollar. The principal amount and/or number of shares of each new security which a Secured Creditor will receive on account of his holding or any particular series of existing bonds will be determined by multiplying the appropriate consideration per \$1,000 bond for each such series shown in Exhibit E by the total principal amount of bonds held in such series divided by \$1,000, and then applying the rounding computation described in the introduction to this Section 5 to determine the actual principal amount and/or number of shares of new securities to be issued. The amount of Claim per \$1,000 bond set forth in Exhibit E does not, however, include any fixed interest represented by unrepresented coupons falling due on or before the last payment date prior to June 26, 1972. In order for the holder of any Claim represented by such unrepresented coupons to receive payment therefor as provided in the exception in the preceding paragraph, such holder must present such coupons as provided in Section 8.6 of this Plan.

5.9 CLASS H: These Claims (including interest thereon, if allowable in accordance with the terms set forth below) will be satisfied by the issuance of Capital Stock. Interest will be allowed on those Claims timely filed and claiming interest which are based on contractual agreements calling for payment of interest. In such case, interest (exclusive of penalties) will be calculated on the principal amount of such Claims without any compounding, at a rate not to exceed 7% per annum.

5.10 CLASS I: The Stockholder will receive nothing under the Plan.

SECTION 6 MANAGEMENT

6.1 Number, Election and Term of Board of Directors: The initial number of directors shall be three. Within 20 days after the Confirmation Date, the Court will designate, after first reviewing the recommendations of the Reorganization Managers, the individuals who will serve as initial directors of the Reorganized Company. The individuals recommended by the Reorganization Managers will have been chosen by the major creditor and claimant groups in the following manner:

(a) If the Trustees or Reorganization Managers shall not have made the determination referred to in Section 7.4 of this Plan prior to the Court's designation, the Board shall be composed of three individuals, selected as follows: (i) 1 initial director by the Indenture Trustees of the indentures the Claims in respect of which shall be satisfied in part by the issue of Notes; (ii) 2 initial directors by the Indenture Trustees of the indentures the Claims in respect of which shall be satisfied in whole or in part by the issue of Capital Stock and of the indenture pursuant to which the Erie Income Debentures were issued; provided, however, that in the event the members of any group of Indenture Trustees referred to in clause (i) or in clause (ii) do not agree on the director or directors to be initially named by such group, a

list of all nominees for directorship by the Indenture Trustees composing such group shall be submitted to the Reorganization Managers, who shall recommend to the Court from such list that individual, or individuals, as the case may be, who shall serve as the initial director, or directors, selected by such group.

(b) If the Trustees or Reorganization Managers shall have made the determination in Section 7.4 of this Plan prior to the Court's designation, the initial Board of Directors shall consist of three individuals who shall be chosen in accordance with the provisions of clause (ii) of subparagraph (a) of this Section, subject to the proviso set forth at the end of said subparagraph.

On or promptly after the Consummation Date, the initial Board of Directors will meet to select all officers of the Reorganized Company, including the chief executive officer, and to provide for the issuance of the securities of the Reorganized Company. At that meeting, the initial Board of Directors will call a special meeting of all the security-holders of the Reorganized Company entitled to vote in the election of members of the Board of Directors, with due notice to all such security-holders, to be held within 150 days after the Consummation Date, for the purposes of electing directors to replace the initial directors designated by the Court and conducting such other business as may be brought before the meeting. At such meeting of the security-holders, if the initial Board is composed as provided in subparagraph (a) of this Section 6.1, replacement directors shall be elected by the security-holders of the Reorganized Company in the following manner:

<u>Group</u>	<u>No. of Directors</u>
Reorganization Notes	1
Capital Stock	2

When holders of the Notes vote for the election of directors, as aforesaid, they shall be entitled to one vote for each \$100 principal amount of Notes held. If the initial Board is composed as

provided in subparagraph (b) of this Section 6.1, all three replacement directors shall be elected at such meeting by the holders of the Capital Stock.

The Board will be a working board, usually meeting monthly. Except as noted below, each director will serve until the next annual meeting of the Reorganized Company when his successor will be elected and qualified.

If the Trustees or the Reorganization Managers shall not have made the determination referred to in Section 7.4 of this Plan and, accordingly, Reorganization Notes shall have been issued or then, when all such Notes shall thereafter have been paid or redeemed by the Reorganized Company, the person elected by the holders of the Notes shall automatically cease to be a director, and such vacancy shall be filled on an interim basis in accordance with the provisions of the immediately following paragraph.

Any director who is elected at an annual or special meeting of the reorganized Company will serve until the next annual meeting. Vacancies on the Board shall be filled on an interim basis by a person appointed by the remaining member of the Board, if any, elected by the security-holders who elected the director being replaced or if there is no such remaining member, by a majority of the whole Board of Directors. If such appointment shall be made more than 60 days prior to the date scheduled under the by-laws of the Reorganized Company for the next annual meeting, a special meeting shall be called to be held not more than 60 days following the date of such appointment for the election of a director to serve, in the directorship theretofore filled by such interim appointee, until the next annual meeting. Any director appointed on an interim basis shall serve until such special meeting or until the next annual meeting, as the case may be; provided, however, that any action of the Board of Directors which involves any proposed settlement of the Tax Proceedings or any portion thereof may be taken only when all members of the Board are directors either initially designated by the Court or have been elected by the security-holders.

6.2 Prosecution of the Tax Proceedings: The indenture for the Notes and the certificate of incorporation of the Reorganized

Company will each contain a provision requiring the Reorganized Company to prosecute the Tax Proceedings in such manner as the Board of Directors may determine will provide the greatest net benefit to the Reorganized Company taking into consideration the cost and delays of litigation. The Reorganized Company shall not expend more time or money on the prosecution of the Tax Proceedings than would reasonably be expended by a prudent man entitled to the immediate possession of all amounts reserved for, but not finally required to be paid in satisfaction of, the tax liabilities; and, if in the sole judgment of the Board of Directors it is prudent and in the best interests of the Reorganized Company to settle the Tax Proceedings, it may do so on such terms as shall be approved by a majority vote of the then authorized number of directors constituting the whole Board of Directors, subject to the provisions of Section 6.1 of this Plan.

6.3 Board Committee: The by-laws of the Reorganized Company may provide for various committees of the Board of Directors, such as audit, executive and finance committees.

6.4 Staff: The staff of the Trustees immediately prior to the Plan Consummation Date will be offered employment with the Reorganized Company for assignment to new or continuing functions and will serve at the pleasure of the Board of Directors or its designees, subject to such employment contracts as shall have been made by the Trustees pursuant to the authorization granted in Order No. 1130.

6.5 Interim Management: The Trustees will serve as the Reorganization Managers between the Plan Confirmation Date and the Plan Consummation Date, subject to the control of the Court. In the event of the death, incapacity or resignation of a Reorganization Manager, the remaining Trustee shall serve as sole Reorganization Manager unless the Court determines otherwise.

SECTION 7

EXECUTION OF PLAN

7.1 Confirmation of the Plan: After approval by the Court of all provisions of this Plan, the Plan will be submitted for acceptance or rejection in accordance with Section 77(e) of the Bankruptcy Act to the claimants in each class (other than those classes found by the Court not entitled to vote) whose Claims (whether liquidated or unliquidated) have been filed and not disallowed. This Plan does not have to be submitted to claimants in Classes A, B, C, D and G-1 because such claimants are to be paid in cash in full, or to the claimant in Class I whose interest is without value.

If the Court finds that this Plan has been accepted in accordance with Section 77(e) of the Bankruptcy Act, the Trustees will, or if the Court does not so find, the Trustees may, request the entry by the Court of supplemental orders confirming this Plan and directing its consummation.

If the Plan has not been so accepted by the claimants in each class entitled to vote on the Plan in accordance with Section 77(e) of the Bankruptcy Act, the Court may nevertheless confirm the Plan if it is satisfied and finds, after hearing, that the Plan makes adequate provision for fair and equitable treatment for the interests or claims of any class of claimants which is affected by and has rejected the Plan; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the Plan conforms to the other requirements of said Section 77(e).

7.2 Reservation and Issuance of Securities: Except as shall be otherwise provided by the Court or in this Plan, upon the Plan Consummation Date the Reorganized Company will reserve or provide for the issuance of the maximum amounts of securities required to be issued by the Reorganized Company in accordance with this Plan. Issuance and delivery of such securities will take place, from time to time, on and after the applicable Distribution Date to those claimants whose Claims have

been finally allowed, settled or adjudicated prior to such Distribution Date, and, from time to time thereafter, to those claimants whose Claims are thereafter finally settled or adjudicated in the manner set forth in Section 8.5. The securities to be issued to holders of bonds or debentures issued pursuant to the Debtor's mortgages and indentures shall be made subject to requisition within 30 days after Consummation Date, by the entity appointed by the Court as Exchange Agent, following which the exchange of the holders' bonds and debentures will be effected for the new securities, and for cash where applicable, as provided in Section 7.3 of this Plan, all pursuant to such exchange procedures as shall be arranged by the Trustees or the Reorganization Managers with the Exchange Agent, subject to the approval of the Court, or as the exchange procedures may be modified, on appropriate notice, subsequent to the Distribution Date by agreement of the Reorganized Company and the Exchange Agent. All Notes issuable on or after the Consummation Date in exchange or satisfaction of Claims will be dated the applicable Distribution Date.

7.3 Distribution and Reservation of Cash: The distribution of cash to be allocated to claimants as provided in this Plan will take place, from time to time, on and after the applicable Distribution Date to those claimants whose Claims have been finally allowed, settled or adjudicated, prior to the applicable Distribution Date, and from time to time after the applicable Distribution Date to those claimants whose Claims are thereafter finally settled or adjudicated in the manner set forth in Section 8.5. The Reorganized Company shall also reserve at the time of that distribution and from time to time thereafter such amount of cash as it shall determine to be necessary to provide for then unliquidated Claims to the extent such Claims are required to be paid in cash pursuant to this Plan.

In the case of bonds secured by the Debtor's respective mortgages and indentures the distribution of cash shall commence by the disbursement to, or requisition in whole or in part by, the entity appointed by the Court as Exchange Agent of the amount of cash due to the holders of such bonds. Thereafter, commencing on the applicable Distribution Date, the exchange

of such bonds will be effected for such cash, and, pursuant to Section 7.2 hereof, for any securities due to be issued to the holders of such bonds, all pursuant to exchange procedures arranged by the Trustees or the Reorganization Managers with the Exchange Agent, subject to the approval of the Court, or as the exchange procedures may be modified, on appropriate notice, subsequent to the Distribution Date by agreement of the Reorganized Company and Exchange Agent. While any such cash remains in the hands of the Exchange Agent, it shall be held in trust for the benefit of the claimants entitled thereto under the provisions of the Plan. Any such cash shall be invested for the account of the Reorganized Company under terms and conditions arranged from time to time with the Exchange Agent by the Trustees, the Reorganization Managers or the Reorganized Company, provided, however, that any such investments shall conform, as to kind of security or other investment and as to maturity, with the provisions of paragraph 4 of Order No. 1152 of the Court: and provided, further, that the interest or other income from such investments shall be remitted monthly to the Reorganized Company for the sole and exclusive purpose of depositing the same with the Master Trustee pursuant to the Master Trust Agreement.

7.4 Distribution of Cash in Lieu of Notes: Notwithstanding any other provision of this Plan, if the Trustees or the Reorganization Managers determine that there will be sufficient cash at Consummation Date, after a proper reserve for all taxes, the initial Working Capital herein provided for and all other amounts which in their judgment should be reserved for unliquidated Claims and contingencies, to pay in full the amount of the Claims that would otherwise be satisfied by the issuance of the Notes, they shall file with the Court, not less than 20 days prior to the Consummation Date, a report in reasonable detail in support of such determination, and shall cause notice of such determination to be published once, prior to the Consummation Date, in *The Wall Street Journal* (all domestic editions), *The New York Times* and *The Cleveland Plain Dealer*. Subject to the

foregoing, the Reorganized Company shall satisfy such amount of Claims by the payment thereof in cash in full, in which event such Notes shall not be issued.

7.5 Notice of Distribution Date: Prior to the Consummation Date, the Reorganization Managers shall fix the Distribution Date in respect of each of the classes of claimants denominated Class B through Class H, inclusive, and notice thereof shall be given by mail to all record holders of liquidated Claims in Classes B, C and D not less than 10 days prior to the Distribution Date and in Classes E, F, G-1, G-2 and H not less than 20 days prior to the Distribution Date. The notice shall state that any Claim for interest on the principal portion of such Claim to which the holder is entitled by reason of the provisions of this Plan shall cease to accrue on and after the Distribution Date. In the case of Classes G-1, G-2 and H, the notice of the Distribution Date shall also be mailed to persons at their last known addresses who have advised the Trustees that they are owners of bonds or debentures in coupon form, and shall further state the substance of the provisions set forth in Section 8.6 of this Plan and shall additionally be given by publication once a week in at least two different calendar weeks, the second of which publications shall occur not less than 10 days prior to the Distribution Date, in *The Wall Street Journal* (all domestic editions), *The New York Times* and *The Cleveland Plain Dealer*.

7.6 Consummation Procedure: Upon entry by the Court of orders confirming this Plan, the Debtor will have the full power and authority to and will put into effect and carry out this Plan and the orders of the Court relative thereto, under and subject to the control of the Court, the laws of any state or the decision or order of any state court or other authority to the contrary notwithstanding. Following entry by the Court of an order or orders confirming this Plan and fixing the Consummation Date, the Reorganization Managers will take all steps to complete the Consummation of the Plan and generally to wind up the reorganization proceedings. The Reorganization Managers will have full power and authority to take any and all steps deemed necessary or appropriate to effectuate or consummate this Plan. Subject to the terms of this Plan, to any applicable provision of

law and to the approval of the Court, the Reorganization Managers will determine provisions, covenants and terms to be omitted, added, changed, retained or substituted in the certificate of incorporation and the by-laws of the Reorganized Company, the Master Trust Agreement, all indentures, instruments, and documents relating to securities to be issued in accordance with this Plan and all other papers, certificates and other instruments of whatever nature necessary or deemed by the Reorganization Managers appropriate to the Consummation of the Plan; and the Reorganization Managers will determine all forms, instructions, letters of transmittal and similar instruments to be employed in carrying out distributions under this Plan.

7.7 Employment of Agents: In the Consummation of the Plan, the Reorganization Managers may employ such agents, transfer agents, registrars, trustees, depositaries, exchange agents, accountants, attorneys, financial advisors and others as they may deem necessary or appropriate. The Reorganization Managers may from time to time delegate to others any power or discretion conferred upon them by this Plan. No Reorganization Manager will be liable for any such action taken by him or by any person employed by him, except for the individual willful neglect of such Reorganization Manager.

7.8 Retention of Jurisdiction by the Court: The Court will retain exclusive jurisdiction under §77 of the Bankruptcy Act over the assets dealt with by this Plan, and over any persons appearing in the reorganization proceedings, for the purposes of: determining any claims asserted by or against the Debtor or the Trustees or the Reorganization Managers; construing any order in respect of this Plan; and carrying out and giving effect to any and all provisions of this Plan and the orders confirming this Plan, fixing terms of the Consummation of the Plan and entering the final decree. The Court may cure any defect, supply any omission or reconcile any inconsistency in such manner or to such extent as may be necessary or expedient in order to carry out this Plan effectively. On the Consummation Date, the reorganization proceedings will be terminated, and a final decree will be entered by the Court pursuant to Section 77(f) of the Bankruptcy Act discharging the Trustees and the Reorganization

Managers and making such provisions as may be equitable, by way of injunction or otherwise, closing the case subject to the reservation of jurisdiction by the Court as provided herein. The Court will also retain exclusive jurisdiction under §77 of the Bankruptcy Act for the purpose of determining any and all claims or controversies arising out of any alleged failure or inability of the Reorganized Company to pay, purchase or redeem any Notes issued by it pursuant to this Plan in accordance with their respective terms (whether or not the securities issued pursuant to the Plan shall at the time be held by persons appearing in the reorganization proceedings). The terms of all securities issued by the Reorganized Company pursuant to this Plan shall expressly provide that any and all claims or controversies arising out of any such failure or inability shall be determined by the Court under its reserved jurisdiction.

7.9 Indenture Trustee Holdback: Against receipt of the Debtor's outstanding bonds secured by the Debtor's respective mortgage indentures duly surrendered to the Exchange Agent for cancellation under appropriate letters of transmittal by the holders thereof, the Exchange Agent shall distribute to the bondholders the appropriate amount of cash and/or securities of the Reorganized Company due to each bondholder as calculated in accordance with the provisions of the Plan subject to the further provisions of this Section 7.9.

(a) **Cash Holdback:** Each Indenture Trustee under one of the indentures listed in Exhibit D, with the exception of the indentures pertaining to the following issues of bonds, namely (i) D.L.&W., New York, Lackawanna & Western Division Income Bonds and (ii) D.L.&W. Warren Division Bonds (hereinafter together called the "Excepted Indentures"), is authorized to instruct the Reorganized Company to deduct from the cash due to the bondholders an amount equal to 50% of the amount such Indenture Trustee so instructing has estimated in writing to the Trustees or Reorganized Company will be its claim under Section 77(c)(12) of the Bankruptcy Act for reasonable compensation and expenses in respect to each such mortgage for which it acts as Indenture Trustee (the amount so deducted in respect to each such mortgage being herein called the "Cash Holdback"). Each

bondholder's pro rata share of the Cash Holdback shall be determined by multiplying the Cash Holdback by a fraction, the numerator of which is the amount of such bondholder's claim with respect to its bonds (subject to the requirement of Section 8.6 of the Plan as to aggregation of claims), and the denominator of which is the aggregate of all bondholders' claims under such mortgage, which pro rata amount shall be subtracted from the aggregate amount of cash otherwise distributable to such bondholders based on the amounts set forth in Exhibit E of the Plan (as updated as provided in Section 4.2 of this Plan).

The Reorganized Company shall instruct the Exchange Agent to distribute to the respective Indenture Trustees the amount of Cash Holdback to which each is entitled hereunder. Each Indenture Trustee shall hold such amount in trust subject to subsequent Court approval of the amount of the reasonable compensation and reimbursement of expenses due to each Indenture Trustee under each such mortgage for which it acts as Indenture Trustee which has not been fully allowed and paid from the assets of the Debtor's estate pursuant to Section 77(c)(12) of the Bankruptcy Act or otherwise (the "Insufficiency" as used in this subparagraph (a)). If the amount of Cash Holdback received by such Indenture Trustee (together with any earnings received with respect to the investment thereof) exceeds the Insufficiency, such excess shall be promptly paid over by the respective Indenture Trustees to the Exchange Agent for distribution to those bondholders who have exchanged, or thereafter exchange, their outstanding bonds for cash of the Reorganized Company, in accordance with the following provisions: the portion of such excess (and any earnings thereon) to be distributed to each such bondholder, after deduction of the pro rata share of the cost to the Trustees (including without limitation the charges and expenses of the Exchange Agent) of administering the provisions of this Section 7.9, shall be determined by multiplying such excess (and any earnings thereon) by a fraction, the numerator of which is the amount of such bondholder's claim with respect to its bonds (subject to the requirement of Section

8.6 of the Plan as to aggregation of claims) and the denominator of which is the aggregate of all bondholders' claims under the applicable mortgage.

(b) **Non-Cash Holdback:** Each indenture trustee under one of the Excepted Indentures and the indenture trustee under the Erie Income Debentures (herein, in this subparagraph (b), an "Indenture Trustee" or the "Indenture Trustees") are authorized to instruct the Reorganized Company to deduct from the shares of Capital Stock due to the respective bondholders the number of shares which when valued at \$100 per share will have a value equal to 90% of the amount such Indenture Trustee so instructing has estimated in writing to the Trustees or Reorganized Company will be its claim under Section 77(c)(12) of the Bankruptcy Act for reasonable compensation and expenses in respect of each such mortgage for which it acts as Indenture Trustee (the amount so deducted in respect of each such mortgage being herein called the "Holdback"). The calculation of the number of shares of Capital Stock to be distributed to the bondholders under each such mortgage shall give effect to the Holdback, as follows: *first*, each bondholder's pro rata share of the Holdback shall be determined by multiplying the Holdback by a fraction, the numerator of which is the amount of such bondholder's claim with respect to its bonds (subject to the requirement of Section 8.6 of the Plan as to aggregation of claims), and the denominator of which is the aggregate of all bondholders' claims under such mortgage; *second*, the amount so determined shall be subtracted from the aggregate dollar amount of the shares of Capital Stock distributable to such bondholder based on the amount payable per \$1,000 bond as set forth in Exhibit E of the Plan in the case of bonds issued under an Excepted Indenture, and as determined by the Reorganized Company in the case of the Erie Income Debentures; and *third*, the number of shares distributable to such bondholder shall then be determined in accordance with the rounding convention set forth in the introductory paragraph of Section 5 of the Plan.

The Reorganized Company shall issue or cause to be issued in the name of each Indenture Trustee (or its designated nominee) shares of Capital Stock of the Reorganized Company representing the Holdback to which it is entitled hereunder and disburse the same to the Exchange Agent for distribution to the respective Indenture Trustees (or their respective designated nominees). Subject to subsequent Court approval of the amount of the reasonable compensation and reimbursement of expenses due to each Indenture Trustee under an Excepted Indenture which has not been fully allowed and paid from the assets of the Debtor's estate pursuant to Section 77(c)(12) of the Bankruptcy Act or otherwise (the "Insufficiency" as used in this subparagraph (b)), each such Indenture Trustee which has received such Holdback is authorized to sell shares of Capital Stock constituting the Holdback in an amount so that the proceeds thereof, including any distributions received thereon, equals the Insufficiency, plus all related expenses of sale. Such sales shall be made as soon as practicable, and in any event within 180 days, after such Court approval. Thereafter, the remainder of the Holdback, if any, and any remainder of any distributions received thereon, or if there shall be no Insufficiency, the entire amount of the Holdback and any distributions received thereon, shall be transmitted by the respective Indenture Trustees to the Exchange Agent for distribution to those bondholders who have exchanged, or thereafter exchange, their outstanding bonds for cash and securities of the Reorganized Company, in accordance with the following provisions: *first*, the Exchange Agent shall sell all the shares of Capital Stock constituting the Holdback, or such remainder thereof, so that only cash shall be available for distribution in respect of such remainder; *second*, there shall be deducted from the proceeds of such sale the cost of sale, together with the pro rata share of the cost to the Trustees (including without limitation the charges and expenses of the Exchange Agent) of administering the provisions of this Section 7.9; and *third*, the portion of the net amount determined as aforesaid to be distributed to each such bondholder shall be determined by multiplying such net amount by a fraction, the numerator of which is the amount of such bondholder's claim with respect to

its bonds (subject to the requirement of Section 8.6 of the Plan as to aggregation of claims) and the denominator of which is the aggregate of all bondholders' claims under the applicable mortgage.

Any Indenture Trustee which avails itself of the benefits of this Section 7.9(b) agrees to comply with the limitations and requirements of Rule 148 of the Securities and Exchange Commission promulgated under the Securities Act of 1933, as amended, in connection with any sale of Holdback securities by it or for its account.

Until such time as the Holdback is sold in accordance with the foregoing, there shall be no voting rights, as provided under the Plan or otherwise, attributable to the shares of Capital Stock constituting the Holdback.

(c) **Application to Collateral Trusts:** For purposes of this Section 7.9 only, any bonds of the Debtor held in any of the Collateral Trusts referred to in Exhibit D to this Plan shall be treated as though they were outstanding and entitled to receive payment in cash and/or securities of the Reorganized Company on the same basis as outstanding bonds under their applicable mortgage. The total Cash Holdback under subparagraph (a) above or Holdback under subparagraph (b) above, as the case may be, with respect to any such mortgage shall be allocated between the bonds actually outstanding and the bonds held in the Collateral Trust, in the same proportion that the total claims of such outstanding bonds and the total claims of such bonds held in the Collateral Trust, respectively, bear to the total claims of all such bonds; and the amount of Cash Holdback or Holdback allocated to the bonds of each issue held in the Collateral Trust shall be deducted from the cash or shares of Capital Stock of the Reorganized Company, as the case may be, distributable on or in respect of the outstanding bonds of such Collateral Trust whether or not the Indenture Trustee with respect to such Collateral Trust has instructed the Reorganized Company to make the deduction authorized by this Section 7.9.

SECTION 8

MISCELLANEOUS

8.1 Pre-condition to Distribution Pursuant to Plan: Except as otherwise provided in agreements made by the Trustees and approved by the Court, in the discretion of the Board of Directors of the Reorganized Company, subject to review thereof by the Court sought by any party, no claimant of any class shall be entitled to a distribution of cash or securities pursuant to this Plan (including, without limitation, cash and securities payable in respect of any State or Local Tax Claim on account of real estate taxes in cases where the Debtor or any of its subsidiaries and/or the Debtor's Trustees and/or the Reorganized Company are contesting the assessed values of properties subject to tax by such claimant) unless and until all claims which the Debtor or the Trustees of the Debtor then have against such claimant or against any subsidiary, subdivision, agency or instrumentality of such claimant shall have been paid, settled, or otherwise discharged. The obligation for an amount owed to the Debtor or the Trustees by a claimant (or any subsidiary, subdivision, agency or instrumentality of the claimant) may not be discharged by applying such amount as an offset against the Claim of the claimant except to the extent such Claim is to be satisfied by a distribution of cash.

8.2 Property to be Transferred Free and Clear of Liens: All property, when vested in the Reorganized Company, will be free and clear of all liens and Claims against the Debtor and the Trustees, unless otherwise specifically provided in this Plan, and the Debtor and the Trustees will be discharged from all debts and liabilities. The Court may require the Trustees, the Debtor, the trustee of any instrument securing any obligation of the Debtor, any mortgagee, and all other proper and necessary parties, to make such transfers, conveyances or satisfactions of mortgages in recordable form, and may require the Debtor to join in any such transfers, conveyances or satisfactions, as may be necessary to expedite the Consummation of the Plan and the vesting of good title in the Reorganized Company.

8.3 Sales of Properties by Trustees Subject to Tax Liens: In those instances in which the Trustees have with Court approval sold property subject to tax liens and in which the purchasers of such properties have agreed to assume the obligation to pay such taxes and to indemnify the Trustees against any liability by reason of non-payment thereof, the Trustees and the Reorganized Company, from and after the Consummation Date, will be discharged from any and all liability in connection with such taxes, the laws of any state or local taxing authority to the contrary notwithstanding.

8.4 Executory Contracts: In accordance with the provisions of Section 77(b) of the Bankruptcy Act, upon consummation of this Plan all executory contracts of the Debtor, with the exception of any executory contract specifically assumed by the Trustees prior to the Consummation Date and any executory contract to be specifically assumed by the Trustees in accordance with an amendment to this Plan, are rejected as of the date of filing of the Petition for Reorganization of the Debtor, which rejection is, insofar as it relates to executory contracts of the Debtor heretofore assumed by Conrail or other transferees pursuant to the Rail Act, deemed to be a rejection solely of the Debtor's and of the Trustees' remaining obligations and liabilities, if any, under such contracts.

8.5 Claims Undetermined Prior to the Confirmation Date: Any Claim against the Debtor in a class entitled to participation under this Plan which has not been finally settled or adjudicated prior to the confirmation Date and which shall thereafter be settled or adjudicated, shall be entitled to be treated under this Plan in the same manner as if it had been settled or adjudicated prior to the Confirmation Date. The obligation of the Reorganized Company to the holders of such Claims will be limited to their participation provided herein and elsewhere in this Plan. The Reorganized Company shall have the right to settle or compromise all Claims against the Debtor or the Trustees or the Reorganization Managers, provided that the Reorganized Company may not settle any Claim on a basis inconsistent with the treatment for such Claim provided in this Plan without the prior approval of the Court.

8.6 Exchange of Securities: Holders of bonds or debentures of the Debtor presented in exchange for cash and/or securities of the Reorganized Company will be entitled to payment in cash and/or securities as provided in this Plan, in the full amount of their allowed Claims, both with regard to principal and accrued interest, whether or not all interest coupons are attached to such bonds or debentures, except that any Claim for fixed interest represented by unrepresented coupons falling due on or before the last payment date prior to June 26, 1972 must be presented in order to entitle the holder of such Claim to receive the cash or securities to which such holder is entitled in accordance with Section 5.7 or Section 5.8 of the Plan. Except as provided in the immediately preceding sentence, presentation of interest coupons alone will not entitle the holder thereof to any payment. The amount of cash and or securities of the Reorganized Company to be issued to each holder of bonds or debentures of the Debtor included in Class G-2 or in Class H (hereinafter in this paragraph referred to together as "Bonds") shall be calculated on the basis of the aggregate amount of such holder's allowed Claim with respect to each issue or series of Bonds of the Debtor held by such holder. At the time such Bonds are tendered in exchange, the holder thereof shall be required to represent that the Bonds so tendered constitute all of the Bonds of that issue or series owned of record or beneficially by such holder; provided, however, that in the case of Bonds of the Debtor presented by any nominee or broker, such nominee or broker shall be required to represent that the Bonds so presented in behalf of any beneficial owner, constitute all of the Bonds of such issue or series held by such nominee or broker for the account of such owner.

8.7 Termination of Right to Receive Cash or New Securities Under Plan: The rights of all security-holders, creditors and claimants to receive cash and/or securities of the Reorganized Company upon the surrender of securities of the Debtor or the execution of appropriate release and satisfaction of Claim forms shall terminate five years after the Consummation Date or,

as to Claims asserted as of the Consummation Date but not approved, acknowledged or allowed until after the fourth anniversary of the Consummation Date, one year after the date of such approval, acknowledgment or allowance. Security-holders, creditors and claimants who do not surrender securities of the Debtor or execute forms of release and satisfaction within the time herein specified will not be entitled to participation under this Plan. Any cash and securities of the Reorganized Company issuable but not distributed and any interest, dividends or distributions thereon not distributed within such period shall become the sole and exclusive property of the Reorganized Company free and clear of any right, title, and interest other than that of the Reorganized Company, the escheat or abandoned property laws of any state to the contrary notwithstanding.

8.8 Classification Conditional on Confirmation of Plan: The classification of claimants in this Plan and all statements contained in this Plan as to such classification are conditioned upon the approval and confirmation of this Plan. If this Plan is not approved or, if approved, is not confirmed, such classification and the proposed treatment will not be binding upon the Debtor or the Trustees and will be without prejudice to the rights of any third party in interest and of the Trustees. No statement contained in this Plan will be deemed to be an admission as to the relative rights or interests of any claimant.

8.9 Statement or Explanation Not Warranty or Representation: No statement or explanation contained in this Plan is to be considered as a warranty or representation or as a condition to the binding effect of this Plan upon any creditor or claimant, whether or not such claimant shall have voted for or against the approval of this Plan, once this Plan shall have been confirmed by the Court. Except with the approval of the Court, no defect or error in this Plan, and no change in the estimates and assumptions underlying the allocation of cash or the distribution of securities as outlined in this Plan, will serve to release any such creditor or claimant from the terms of and obligations under this Plan, which terms and obligations, by virtue of the confirmation of this Plan, such creditor or claimant shall be deemed to have irrevocably accepted.

8.10 Books, Files and Records: The property to be vested in the Reorganized Company under this Plan will include all books, files, records and other papers of the Debtor, the Trustees and the Reorganization Managers.

8.11 Issuance of Securities: Upon entry of an order confirming this Plan, the Court will, without further proceedings, grant authority for the issuance of securities and the assumption of obligations to the extent contemplated by this Plan. The provisions of Title I and of Section 5 of the Securities Act of 1933, as amended, will not apply to the issuance, sale or exchange of the securities issued pursuant to this Plan and all such securities and transactions therein shall, for purposes of said Act, be treated as if they were specifically mentioned in Sections 3 and 4 of said Act, respectively.

8.12 Giving of Notice: Whenever notice is to be given under this Plan, the Court will designate the time within which, the persons to whom, and the form and manner in which, such notice will be given. All such notices, unless otherwise specified, will be given by the Trustees.

8.13 Table of Contents and Section Headings Not Controlling: The table of contents and the section headings contained in this Plan are for convenience only and will not control the meaning or interpretation of this Plan or any of its provisions.

8.14 Certain Tax Questions: The Trustees have received approximately \$132 million of interest on the principal amount of the settlement of the Valuation Case. In the case of another railroad, the Internal Revenue Service has ruled that interest received on such a settlement is taxable.

The principal amount of the settlement received in the Valuation Case is estimated to be approximately \$56,000,000 less than the basis of the assets transferred under the Rail Act, giving rise to a loss in that amount. If the excess of the loss over any gain for the year is an ordinary loss, it can be used to offset interest income received on the settlement of the Valuation Case. If it is a capital loss, it can only be used to offset capital gains, and there are not enough such gains in prospect to use all of the loss. In the case of another railroad, the Internal Revenue Service has issued a ruling which implies that such a loss should be treated as a

capital loss rather than an ordinary loss. Notwithstanding such ruling tax counsel advise that, while the question is not free from doubt, in their opinion the loss should be treated as an ordinary loss.

For tax years through January 4, 1982, when N&W disposed of its holding of the Debtor's stock, the Debtor was a member of the N&W affiliated group filing consolidated federal income tax returns. Thus, the Debtor's losses from operations through January 4, 1982 were used by the N&W affiliated group on its consolidated income tax returns.³ The losses so used have substantially exceeded the tax basis of the stock of the Debtor. Such losses in excess of basis are required to be restored to income of the N&W group as of January 4, 1982. Under legislation enacted in 1980, such excess losses incurred through the year 1976 in the amount of approximately \$29,300,000 are restored to the Debtor for use against any amount of income received or accrued pursuant to the settlement of the Valuation Case. In the opinion of tax counsel, the amount so restored to the Debtor may be used as a deduction against the internal income received upon settlement. Again, however, some question is raised by the position of the Internal Revenue Service, which has ruled in the case of another railroad that operating losses which have in general expired by lapse of time but which may, by statute, be used against any amount of income received or accrued pursuant to the settlement of a valuation case, may not be used against interest income arising from such a settlement.

By reason of the receipt of the Gross Valuation Case Proceeds and the Trustees' projection of operations for the balance of 1982, it is anticipated that the Trustees will pay significant estimated federal income taxes during the course of the year.

In connection with the initial plan or reorganization filed by the Trustees in December, 1978, a ruling was obtained from the Internal Revenue Service that, subject to reservations, the exchange of obligations of the Debtor under the plan for notes and

3. The joinder of the Debtor in the filing of such a consolidated return for the first four days of 1982 will be binding on the Reorganized Company under an agreement submitted to the Court for its approval in Document No. 3319.

bonds of the Reorganized Company and of income debentures for preferred stock would be tax free. The Trustees may request a further ruling that the exchanges of obligations of the Debtor under the 1982 Plan for Notes and Capital Stock will be tax free. It is not clear whether such a ruling will be obtainable under the changed circumstances of the 1982 Plan, and the Trustees may decide not to submit such a request, or to withdraw it after submission.

8.15 **Exhibits:** Attached to and made a part of this Plan are the following Exhibits:

- Exhibit A: Summary of Claims and Proposed Payment in Cash and Securities Estimated at September 30, 1982
- Exhibit B: Summary of Section 211(h) Claims Estimated As Of September 30, 1982
- Exhibit C: Summary of Estimated State & Local Tax Claims As Of September 30, 1982
- Exhibit D: Summary of Claims and Proposed Payment in Cash and Securities-Secured Creditors-Estimated at September 30, 1982
- Exhibit E: Summary of Estimated Payments in Cash and Securities Per \$1000 Bond Upon Reorganization
- Exhibit F: Summary of Available Cash at Consummation Date Estimated at September 30, 1982, Proposed Allocation of Available Cash, and Summary of Anticipated Receipts from Asset Disposition Program Subsequent to September 30, 1982

THOMAS F. PATTON and
RALPH S. TYLER, JR.
Trustees of the Property of
Erie Lackawanna Railway
Company, Debtor

Counsel:

Harry G. Silleck, Jr.
Richard S. Farrow
Mudge Rose Guthrie & Alexander
20 Broad Street
New York, New York

EXHIBIT A

**ERIE LACKAWANNA RAILWAY COMPANY
THOMAS F. PATTON AND RALPH S. TYLER, JR.,
TRUSTEES**

**SUMMARY OF CLAIMS AND PROPOSED PAYMENT IN
CASH AND SECURITIES
ESTIMATED AT SEPTEMBER 30, 1982
(Dollars in Thousands)**

Class	General Description	Estimated Liability*	Payment in Cash and Securities		
			Reorganization		
			Cash	Notes Series D	Capital Stock #
A	Reorganization Costs & Expenses	\$ 7,500	\$ 7,500	\$	\$
B	Section 211(h) Claims	71,565(1)	71,565		
C	State & Local Tax Claims	56,213(2)	56,213		
D	Other Claims of Admin- istration	6,576(3)	6,576		
E	Administrative Per Diem Claims	1,367(4)	342		1,025
F	"Six-Months" Claims	4,486(5)	2,243		2,243
G-1	Secured Creditor Claims (Including EL Collateral Trust)	209,974(6)	209,974		
G-2	Other Secured Creditor Claims	82,403(6)	36,936	24,559	20,908
H	General Unsecured Pre-Bankruptcy Claims	64,042(7)			64,042
I	Stockholder Interest	—			
	TOTAL	\$504,126(8)	\$391,349	\$24,559	\$88,218

* The statement of amounts of claims shown on this Exhibit, as amplified in the following exhibits, should not be taken as necessarily constituting agreement on the part of the Debtor's Trustees as to amounts or priorities claimed.

One share of Capital Stock will be issued for each \$100 of claim.

- (1) The amount shown represents the Debtor's estimated liability for Section 211(h) Claims at September 30, 1982, after deducting the \$10,000,000 cash payment approved in Order No. 994 and \$821,000 return of borrowed funds by reason of settlement approved in Order No. 1145. See Exhibit B.
- (2) See Exhibit C.
- (3) The amount shown includes:
 - (a) Claims of Conrail for payments made after March 31, 1976 on the Debtor's conditional sale obligations and leases related to rolling stock alleged to be applicable to the Debtor's pre-April 1, 1976 rail operations, real estate taxes for the period subsequent to March 31, 1976, costs incurred in processing employee wage claims and personal injury claims and miscellaneous other items. These claims, after taking into account certain claims of the Debtor against Conrail of similar character, have been settled in the amount of \$1,750,000 pursuant to approval of the Court. By the terms of the settlement agreement Conrail may withdraw therefrom by reason of the fact that the Plan was not consummated by July 1, 1981. An amendment to the settlement agreement under which that withdrawal right will cease is the subject of a petition pending before the Court. Hearing on that petition has been deferred pending possible renegotiation of the amendment;
 - (b) Claims of former EL employees not subject to collective bargaining agreements for vacation pay asserted in the amount of \$1,654,000 plus interest (the Trustees are contesting liability in the amount claimed);
 - (c) Claims for nonemployee personal injury not included in Class B estimated by the Trustees to be in the aggregate amount of \$2,336,000 (the amounts claimed in proofs of claim or sought in pending litigation, to the extent quantified, substantially exceed this figure); and

- (d) Legal fees in an estimated amount of \$856,000 in connection with New Jersey tax appeals that resulted in substantial reductions of assessed values.

The amount shown does not include any amount for Federal or State income taxes which may be payable in respect of 1982. See Exhibit F.

- (4) "Administrative Per Diem Claims" are defined, pursuant to Order No. 1075 approving a settlement of claims of a Committee of various railroads, as "retroactive" per diem claims for the period August 1969 through August, 1970 which were not disclosed until an Association of American Railroads audit was completed after June 26, 1972, and per diem discrepancy claims which first became incontestable after June 26, 1972. Such claims had been included in per diem claims of the Committee members aggregating \$1,908,000 which they had asserted had "trust fund" status requiring payment in cash in full. Under the settlement all per diem claims not falling within the definition of Administrative Per Diem Claims or Six Months Claims are treated as general unsecured pre-bankruptcy claims — Class H. The terms of this settlement shall also apply to non-Committee railroads. Under the definition of Administrative Per Diem Claims approved by the Court, only duly and timely filed claims asserting priority are considered as Administrative Per Diem Claims.

The aforesaid settlement also resolved claims of the Committee members that approximately \$2,207,000 were owed to them as "trust funds" on account of freight revenue collected by the Debtor during the Pre-Bankruptcy Period. Under the settlement, EL has paid \$1,014,000 in cash and assigned its claims for pre-bankruptcy receivables against Committee members in the amount of \$1,278,000 to the Committee in full satisfaction of the freight revenue claims. Similar "trust fund" claims of non-Committee members less EL pre-bankruptcy receivables have required payment by EL of \$285,000 in cash. It is anticipated that virtually all such "trust funds" will be paid prior to October 1, 1982.

- (5) The treatment of Six Months Claims is provided for in Order No. 1075 above referred to approving a settlement with the Committee of various railroads and is extended by said Order and Order No. 1076 to others asserting priority for claims under the "Six Months" rule. Under the definition of Six Months Claims approved by said orders only duly and timely filed claims for which priority under the six months rule has been asserted are considered as Six Months Claims.
- (6) The amounts shown include fixed interest represented by unrepresented coupons falling due on or before the last payment date prior to June 26, 1972, aggregating \$756,000, which will be payable in cash or securities upon presentation of coupons therefor. See Exhibit D.
- (7) Includes approximately (a) \$44,197,000 (principal and interest) in respect of Erie Railroad Company Income Debentures; (b) \$5,201,000 (principal and interest) in respect of Flood Loan; and (c) \$14,644,000 of other timely filed claims (some of which are in dispute as to the total amount of the claim) participating in proofs of claim program, including claims for advances from parent (Dereco, Inc.) in the principal amount of \$2,008,000 and from coal company subsidiaries in the principal amount of \$420,000. The figure shown in Item (c) includes interest on said claims. The amount shown consists of the original claimed amounts adjusted to eliminate certain claims that have been satisfied, original claims voluntarily or involuntarily withdrawn through Court-ordered liquidation procedures, and certain duplicatory claims.

The amount shown does not include (a) claims relating to guarantees of funded debt issued by others (see Note (8) (i) below) or (b) any other claims referred to in Note (8) below.

- (8) The amount shown does not include any amount for potential liability in respect of pending litigation listed below. Some portion of liability, if any, may relate to the Pre-Bankruptcy Period and some portion to the Post-Bankruptcy Period. The Trustees do not concede liability on any of these claims and in some cases the amount of potential liability is not now determinable.

- (i) claims made or which may be made relating to the guaranty of funded debt of others which (after elimination of duplicative claims) aggregate approximately \$21,643,000. The Trustees have disaffirmed some such guaranty contracts, but their disaffirmance is being contested.
- (ii) claims against two wholly-owned subsidiaries alleging disability under the Pennsylvania Occupational Disease Act, as well as claims against one of said subsidiaries from pneumoconiosis (black lung) under the Federal Coal Mine Health and Safety Act in which the Debtor has also been named as a responsible party. In counsel's opinion the maximum liability, if any, does not exceed \$650,000.
- (iii) potential claims for reimbursement of amounts paid by the claimants to construct certain facilities for the Debtor, which claims relate to post-April 1, 1976 freight traffic, in the estimated amount of \$1,067,000. A similar claim was rejected by the courts.
- (iv) miscellaneous claims in litigation or potential litigation before the Reorganization Court or other courts for approximately \$2,000,000, for alleged liabilities under various contract obligations including: (a) a claim of Erie Dock Co., under a contract for services in connection with operating an ore dock, (b) a claim for violation of covenants to maintain and for damages to a freight house leased by the Debtor, which lease has been conveyed to Conrail, (c) claims in respect of possible liabilities on account of two actions against a company of which EL was a principal owner prior to April 1, 1976 and for attorneys' fees in connection therewith, and (d) other claims in minor amounts.

EXHIBIT B

**ERIE LACKAWANNA RAILWAY COMPANY
THOMAS F. PATTON AND RALPH S. TYLER, JR.,
TRUSTEES**

**SUMMARY OF UNPAID SECTION 211(h) CLAIMS
ESTIMATED AS OF SEPTEMBER 30, 1982**

(Dollars in Thousands)

		<u>Cumulative Borrowings April 30, 1982*</u>	<u>Estimated Interest at Sept. 30, 1982#</u>	<u>Estimated Total Claims at Sept. 30, 1982</u>
I. <i>Undisputed</i>				
Borrowings for preconvey- ance operations (other than items listed below)	(1)	<u>\$26,721(2)</u>	<u>\$19,572</u>	<u>\$46,293(3)</u>
II. <i>Disputed(4)</i>				
Employee Pension Plans	(5)	12,145	7,941	20,086
Employee Labor Claims	(5)	300	203	503
Retirees' Life Insurance	(6)	<u>3,035</u>	<u>1,648</u>	<u>4,683</u>
Total Disputed Claims		<u>15,480</u>	<u>9,792</u>	<u>25,272</u>
Total Claims		<u><u>\$42,201</u></u>	<u><u>\$29,364</u></u>	<u><u>\$71,565</u></u>

* Actual, except as noted in footnote 5.

Rates assumed: Actual rates ranging from 7.66% to 15.81% through April 30, 1982, and 13.224% estimated thereafter; all compounded semiannually.

- (1) Validity of claims for amounts shown is in part subject to audit by the Trustees.
- (2) In addition to the amount shown, \$10 million and \$821,000 of Section 211(h) claims were repaid on January 22 and March 5, 1982, respectively, pursuant to Court approval.
- (3) It is anticipated that a petition will be filed in the near future for authorization to pay the balance of the principal of the undisputed Section 211(h) claims prior to consummation of the Plan, together with all interest to date of payment. See Exhibit F.
- (4) The United States, USRA and Conrail have agreed that the Plan may be consummated without the prior adjudication or settlement of the amount or treatment of these claims.
- (5) Uncertainty exists as to the liability of the Debtor in respect of these obligations and as to their priority which is subject to litigation, pending or

contemplated. Amounts shown as to Employee Pension Plans as of April 30, 1982, are Conrail borrowings of \$10,019,000 for funding the Supplemental Retirement Plan and \$858,000 representing the current payments under the unfunded plans. For convenience, there is included \$1,268,000 of anticipated additional borrowings for payments under the unfunded plans shown as borrowed by April 30, 1982, although it may be that some portion thereof will not be borrowed until later. Employee Labor Claims of \$300,000 represent prepetition claims. All amounts are believed by the Trustees to approximate the maximum amounts which will be claimed by Conrail or USRA.

- (6) Under an amendment to the Rail Act enacted in November 1978 funds were provided under Section 211(h) to pay certain premiums for life insurance or life insurance benefits for retirees of the Debtor. The amount drawn down was \$3,035,000 subject to adjustments at a later date. Under the Trustees' interpretation of the amendment the claims of Conrail or USRA against the Debtor for such amount will have the status of an unsecured pre-bankruptcy claim.

EXHIBIT C

**ERIE LACKAWANNA RAILWAY COMPANY
THOMAS F. PATTON AND RALPH S. TYLER, JR.,
TRUSTEES**

**SUMMARY OF STATE & LOCAL TAX CLAIMS
ESTIMATED AS OF SEPTEMBER 30, 1982**

(Dollars in Thousands)

	Principal				
	<u>Real Estate</u>	<u>Other</u>	<u>Total</u>	<u>Interest(1)</u>	<u>Total</u>
Illinois	\$ 207	\$ 6	\$ 213	\$ 190	\$ 403
Indiana	1,261	47	1,308	579	1,887
New Jersey(2)	10,769	145	10,914	10,875	21,789
New York(3)	9,553	2,748	12,301	8,904	21,205
Ohio	5,336	1,103	6,439	3,036	9,475
Pennsylvania	604	301	905	549	1,454
TOTAL	<u>\$27,730</u>	<u>\$4,350</u>	<u>\$32,080</u>	<u>\$24,133</u>	<u>\$56,213</u>

- (1) Computed at statutory rate, or, if no statutory rate, at 6% per annum. In no case compounded. The calculations are subject to verification and the Company may challenge the amount claimed by tax claimants.
- (2) Amounts shown give effect to judgments which reduce certain real estate assessments.
- (3) Includes settlement of claims for additional sales and use taxes and of claims on account of New York State grade crossing elimination projects, as approved by the Court.

EXHIBIT D

**ERIE LACKAWANNA RAILWAY COMPANY
THOMAS F. PATTON AND RALPH S. TYLER, JR.,
TRUSTEES**

**SUMMARY OF CLAIMS AND PROPOSED PAYMENT
IN CASH AND SECURITIES
— SECURED CREDITS ESTIMATED AT
SEPTEMBER 30, 1982
(Dollars in Thousands)**

Bond Description	Claim			Payment in Cash and Securities		
	Principal	Interest		Cash	Reorganization	
		Pre- Petition	6/27/72- 9/30/82		Notes Series D	Capital Stock
	(a)	(b)	(c)			
Class G-1						
Erie R.R. First Consolidated	\$ 71,507	\$1,093	\$22,929	\$ 95,529	\$ 95,529	\$
Erie R.R. Ohio Div. First	10,995	120	8,744	19,859	19,859	
Chicago & Erie R.R. First	11,997	93	6,155	18,245	18,245	
Norris & Essex R.R. First Ref.	32,640	82	11,722	44,444	44,444	
DL&W Oswego & Syracuse Div.	683	82	420	1,185	1,185	
EL Collateral Trust(d)	12,000	55	8,620	20,675	20,675	
DL&W Penna. Div. First	3,974	29	3,160	7,163	7,163	
Erie R.R. General Mtge. Income	1,512	204	698	2,414	2,414	
TOTAL	<u>145,308</u>	<u>1,758</u>	<u>62,448</u>	<u>209,514</u>	<u>209,514</u>	
Class G-2						
DL&W Lackawanna of NJ Div. First	8,282	498	3,400	12,180	2,485	4,108
NYL&W Ry. First & Ref.	23,412	159	10,497	34,068	8,949	10,440
Warren R.R. First	974	14	350	1,238	422	391
DL&W Utica, Chenango & Susq. Div. First	1,971	233	1,011	3,215	1,918	118
DL&W N.Y.L.&W. Ry. Div. Income	2,283	685	1,172	4,140		4,140
DL&W Warren Div.	975	116	601	1,692		1,692
DL&W Penna. Div. Ref. & Coll. Trust	4,921	36	3,913	8,870	7,847	1,023
DL&W Morris & Essex Div. Coll. Trust	9,568	1,145	5,891	16,604	15,038	1,566
TOTAL	<u>52,386</u>	<u>2,886</u>	<u>26,835</u>	<u>82,107</u>	<u>36,659</u>	<u>20,889</u>
TOTALS	<u>\$197,694(a)</u>	<u>\$4,644</u>	<u>\$89,283</u>	<u>\$291,621</u>	<u>\$24,559</u>	<u>\$20,889</u>

-
- (a) Principal amounts outstanding as of April 30, 1982.
 - (b) Interest from the last payment date through June 26, 1972 at the stated rate in case of solely fixed interest debt and, in case of partially fixed and partially contingent interest debt, fixed interest at the stated rate from the last payment of interest through June 26, 1972 and accumulations of contingent interest which are payable at maturity or on default, as well as accumulations of contingent interest which became owing as a debt under the provisions of certain indentures for calendar years 1965, 1966 and 1969. Does not include fixed interest represented by unrepresented coupons falling due on or before the last payment date prior to June 26, 1972, aggregating \$756,000, which will be payable in cash or securities as provided in the Plan upon presentation of coupons therefor.
 - (c) Interest after June 26, 1972, on fixed interest debt based on stated (coupon) rate or at rate provided in the indenture as the interest rate on overdue principal, whichever is higher; in the case of partially fixed and partially contingent interest debt, at the stated rate of the combined fixed and contingent interest; and in the case of wholly contingent interest debt, at the stated (coupon) rate.
 - (d) The Government Guaranteed Loan.
 - (e) Does not include an aggregate principal amount of Eleven Thousand Dollars of Morris & Essex R.R. Construction Mortgage bonds which matured on November 1, 1955 and which have never been presented for payment. Upon the consummation of the Plan and for a period of five years thereafter payment of the principal of such bonds, plus interest, if any, accrued to said maturity date, will be made upon the presentation of such bonds for payment.
 - (f) Shown at value attributed to claims. One share of Capital Stock will be issued for each \$100 of claim.

EXHIBIT E

**ERIE LACKAWANNA RAILWAY COMPANY
THOMAS F. PATTON AND RALPH S. TYLER, JR.,
TRUSTEES**

**SUMMARY OF ESTIMATED PAYMENTS IN CASH
AND SECURITIES**

PER \$1,000 BOND UPON REORGANIZATION (a)

All Estimated Amounts Rounded Down to the Nearest Dollar

<u>Bond Description</u>	<u>Consideration Per \$1,000 Bond (b)</u>			
	<u>Payment in Cash and Securities</u>			
	<u>Claim per Bond</u>	<u>Cash</u>	<u>Reorganization Notes Series D</u>	<u>Capital Stock (c)</u>
Class G-1				
Erie R.R. First Consolidated 3½%				
Series F due 1990	\$1,335	\$1,335	\$	\$
Series G due 2000	1,335	1,335		
Erie R.R. Ohio Div. First 7%				
(formerly 3¼%) due 1980	1,806	1,806		
Chicago & Erie R.R. First 5% due 1982	1,520	1,520		
Morris & Essex R.R. First Ref. 3½% due 2000	1,361	1,361		
D.L.&W. Oswego & Syracuse Div. First 4-6% due 1993	1,735	1,735		
Erie Lackawanna F.R. Coll. Notes 6½% due 1976	1,722	1,722		
D.L.&W. Pennsylvania Division First 4½% Series A due 1980	1,802	1,802		
Erie R.R. General Income 4½% due 2015	1,597	1,597		
Class G-2				
D.L.&W Lackawanna of New Jer- sey Div. First 4% due 1993				
Series A	1,416	289	650	477
Series B	1,636	333	751	552

Bond Description	Consideration Per \$1,000 Bond (b)			
	Payment in Cash and Securities			
	Claim per Bond	Cash	Reorganization Notes Series D	Capital Stock (c)
New York, Lackawanna & Western Ry. First & Ref. due 1973				
4% Series A	\$1,416	\$ 372	\$610	\$ 434
4½% Series B	1,468	386	633	449
5% Series C	1,520	399	655	466
Warren R.R. First Ref. 3½% due 2000	1,373	433	539	401
D.L.&W. Utica, Chenango & Susquehanna Vy. First 3-5% due 1992	1,631	972	598	61
D.L.&W. New York, Lackawanna & Western Div. Income 5% due 1992	1,813			1,813
D.L.&W. Warren Div. 4-6% due 1992	1,735			1,735
D.L.&W. Pennsylvania Div. Re- funding and Collateral Trust due 1985				
5% Series A	1,802	1,595	207	
4½% Series B	1,802	1,595	207	
D.L.&W. Morris & Essex Div. Collateral Trust 4-6% due 2042	1,735	1,571	164	

- (a) Estimated at September 20, 1982. DOES NOT GIVE EFFECT TO PROVISION THAT SECURITIES WILL NOT BE ISSUED IN LESS THAN \$100 MULTIPLES OR TO PROVISION RELATING TO THE TREATMENT OF FRACTIONAL INTERESTS. See Section 5 of the Plan. It is anticipated that the calculations underlying this exhibit will be updated to a date not more than 90 days prior to the Plan Consummation Date.
- (b) Does not give effect to interest represented by unrepresented coupons falling due on or before the last payment date prior to June 26, 1972, which will be payable in cash or securities upon presentation of coupons therefor.
- (c) One share of Capital Stock will be issued for each \$100 of claim.

EXHIBIT F

**ERIE LACKAWANNA RAILWAY COMPANY
THOMAS F. PATTON AND RALPH S. TYLER, JR.,
TRUSTEES**

**SUMMARY ALLOCATION OF AVAILABLE CASH
AT CONSUMMATION DATE ESTIMATED AT
SEPTEMBER 30, 1982, PROPOSED ALLOCATION OF
AVAILABLE CASH, AND SUMMARY OF ANTICIPATED
RECEIPTS FROM ASSET DISPOSITION PROGRAM
SUBSEQUENT TO SEPTEMBER 30, 1982**

(Dollars in Thousands)

I. Available Cash

A. Escrowed Valuation Case Proceeds, including interest (1)(2)	\$371,168
B. Escrowed Funds from Asset Disposition Program, including interest (2)	75,083
C. Projected Property Sale Proceeds and Other Items (7)	6,847
D. Primary Funds (2)(3)	4,101
E. Funds held by Conrail in respect of section 211(h) claims (as of April 30, 1982) net of estimated liability for unpaid pre-April 1, 1976 obligations (4)	3,455
	<u>460,654</u>
F. Less: Contingencies (20% of Projected Property Sales)	414
TOTAL	<u>460,240</u>

II. Allocation of Available Cash

A. Reserves:	
1) Working Capital Fund	6,000
2) Federal Income Taxes (8)	42,400
3) Contingencies for unliquidated claims (8)	4,000
TOTAL	<u>52,400</u>
B. Balance Available to Claimants	<u><u>\$407,840</u></u>

	Class of Claims	
C. Proposed Allocation to Claimants:		
1) Reorganization Costs & Expenses	A	\$ 7,500
2) Section 211(h) Claims (5)	B	71,565
3) State and Local Tax Claims	C	56,213
4) Other Administrative Claims (6)	D	6,596
5) Administrative Per Diem Claims	E	342
6) "Six Months" Claims (6)	F	2,243
7) Secured Creditors' Claims	G-1	209,974
8) Other Secured Creditors' Claims	G-2	36,936
9) Balance		16,471
TOTAL		<u>\$407,840</u>
III. <i>Anticipated Receipts from Asset Disposition Program (7)</i>		
1) October 1 — December 31, 1982		\$ 4,018
2) 1983		8,660
3) 1984		5,214
4) 1985		2,177
TOTAL		<u>\$ 20,069</u>

- (1) Not of estimated Federal Income Tax payments of \$17,300,000 to be made in three installments on April 15, June and September 15, 1982.
- (2) Interest included in amounts shown in I.A., I.B. and I.D. has been computed at the rate of 3.17% per quarter (13.28% per annum).
- (3) This amount represents the net cash of the Estate (other than Escrowed Valuation Case Proceeds and escrowed funds from Asset Disposition Program), with estimated interest earned thereon through September 30, 1982, after deducting estimate operating cost of the Estate through that date.

- (4) See Exhibit B note (3). If the petition there referred to is filed after reaching agreement with Conrail, and approved, the funds held by Conrail (\$6,205,000) will be applied in reduction of the undisputed Section 211(h) claims and EL will be obligated to pay from its own funds the remaining unpaid pre-April 1, 1976 obligations eligible to be funded under Section 211(h) (other than obligations which if so funded would give rise to disputed Section 211(h) claims). The amount of such remaining obligation, together with related expenses, is estimated at \$2,750,000.
- (5) \$10,821,000 has been paid or discharged in addition to the amount shown. It is expected that a petition will be filed with the Court seeking authorization to pay all undisputed Section 211(h) claims included in the amount shown (see Exhibit B) prior to Consummation Date. Of the amount shown, \$25,272,000 are disputed Section 211(h) claims.
- (6) As to certain of such claims, the Trustees are contesting the amounts claimed.
- (7) Part I, line C included in the projection of available cash on Consummation Date and Part III are based on EL Trustee-approved contract prices in case of sales approved but not closed and, as to property not yet the subject of a sales contract, on real estate appraisals or evaluations which assume marketable title to land. The amounts shown include amounts of deferred payments (Part I, line C: \$872,000; Part III: \$10,425,000) relating to anticipated sales (\$1,832,000) and previously closed sales (\$9,465,000), respectively.
- (8) A separate reserve is not established for possible State income taxes. Any such taxes would be deductible for Federal income tax purposes. The reserve for contingencies for unqualified claims, together with the amount that would be released from the Federal income tax reserve if State income taxes were payable, is believed sufficient to provide for any State income taxes.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

**In Proceedings for the Reorganization of a Railroad
No. B72-2838**

In the Matter of

ERIE LACKAWANNA RAILWAY COMPANY,
Debtor

ORDER NO. 1222

CONSUMMATION ORDER

Upon consideration of the Petition of the Debtor's Trustees and Reorganization Managers for Entry of Orders Confirming and Authorizing Consummation of Plan of Reorganization and of Final Decree (Document No. 3471) (the Petition), the responses thereto and the entire record in these proceedings, and after a duly noticed hearing on the Petition,¹ it appearing that:

1. Pursuant to Order No. 1209, any objections to the Confirmation of the Plan, and answers or responsive pleadings with respect to the proposed form of the Consummation Order (attached as Exhibit C to the Petition and duly served), and objections to the implementing documents, were required to be filed with this Court and served upon the Trustees on or prior to October 15, 1982.

The only objection filed to any of such documents is that filed on October 15, 1982 to the investment provision of the Master Trust Agreement by Union Commerce Bank (UCB) as Indenture Trustee of 5% Income Debentures, which has been assigned Document No. 3492.

While Document No. 3492 is styled as an objection to paragraph 3.03 of

(1) The Plan of Reorganization of Erie Lackawanna Railway Company as Amended to July 12, 1982 (the Plan) was duly approved on July 12, 1982, and, as amended by Amendment No. 1, was duly confirmed on October 29, 1982, pursuant to Orders No. 1190 and No. 1221, respectively; and

(2) Under Section 7.4 of the Plan the Debtor's Trustees or Reorganization Manager (hereinafter referred to as the Trustees) may determine not later than 20 days prior to the Consummation Date that sufficient cash will be available to pay all claims that would otherwise be satisfied by the issuance of Reorganization Notes (the Notes), and such determination has been made as evidenced by Document No. 3491;

The Court makes the following Findings:

(1) This Court has exclusive jurisdiction of the Debtor and its properties, wherever located

(2) This Court has exclusive jurisdiction of all claims, rights, demands, interests, liens and encumbrances of every kind and character of creditors of, or claimants against, the Debtor, the Debtor's Trustees and their properties, whether or not properly or timely filed and whether or not approved in these proceedings.

It is hereby ORDERED that:

the proposed Consummation Order, the substance of the objection is not addressed to the turnover of the Trustees' funds to the Reorganized Company, which is the subject of paragraph 3.03, but to the deposit of these funds under the Master Trust Agreement and more particularly to that Agreement's provision as to investment of funds in Section 6.03.

Inasmuch as this Court required, by Order No. 1202, that all objections to or comments with respect to the Master Trust Agreement and other documents implementing the Plan of Reorganization which were filed in Document No. 3452, be filed with this Court on or before September 20, 1982, and insofar as Document No. 3492 (the UCB objection) is such an objection, it is untimely and will therefore not be considered herein.

I. APPROVAL OF DOCUMENTS, FIDUCIARIES AND AGENTS

1.01, *Approval of Documents*. The following documents, (i) as filed with this Court in connection with the "Petition of the Debtor's Trustees and Reorganization Managers for Approval of Documents Implementing Plan of Reorganization" (Document No. 3452), (ii) as filed in connection with the instant Petition and (iii) as further amended by reports of the Debtor's Trustees to this Court to the date hereof and as stated at the hearing by counsel for the Debtor's Trustees, are approved (Set A, where so designated, being the Set approved as applicable by reason of the determination under Section 7.4 of the Plan that no Notes will be issued) and are found and adjudged to be in all respects in accordance with the true intent and requirements of the Plan and to be appropriate and proper to carry it into effect;

(a) Restated Certificate of Incorporation of Erie Lackawanna Railway Company, the name of which shall be changed to Erie Lackawanna Inc. as of the Consummation Date, together with a certificate eliminating capital in respect of cancelled shares of common stock of the Debtor, as referred to in the supplemental report filed as Document No. 3496, in such form as the Trustees shall determine;

(b) Bylaws of Erie Lackawanna Inc.;

(c) Capital Stock Certificate;

(d) Master Trust Agreement dated as of the Consummation Date between Erie Lackawanna Inc. and National City Bank, Cleveland, as Trustee;

(e) Form of Letter of Instructions to Exchange Agent and, as attachments thereto, forms of letters to holders of claims in Classes G-1, G-2 and H (Income Debentures only), Notice of Exchange and Availability on the Distribution Date of Cash and Securities, and Letters of Transmittal with instructions, together with form of notice and letter relating to tax questions pertaining to certain of such claims;

(f) Memorandum of the Debtor's Trustees to the Reorganized Company as to cash and securities to be distributed to claimants in Classes A, B, C, D, E, F and H (other than Income

Debentures), including, as attachments thereto, forms of letters to claimants in such Classes including notices of Distribution Dates, and instruments of release and satisfaction of claims in such Classes;

(g) Form of instrument of satisfaction of various mortgages and collateral trust indentures;

(h) Form of deed conveying all right, title and interest of the Debtor's Trustees in and to the Debtor's property to Erie Lackawanna Inc.;

(i) Indemnification resolution of Erie Lackawanna Inc.;

(j) Resolution of Board of Directors of Erie Lackawanna Inc. adopting regulations as to responsibilities of directors, officers and employees; and

(k) Notice to holders of claims relating to rejected executory contracts.

Insofar as the provisions of any documents approved above involve a construction or interpretation of the Plan, such construction or interpretation is hereby approved.

102. *Power to Make Certain Corrections.* Before the execution, delivery or filing of any documents referred to in paragraph 1.01 above, the Trustees of the Debtor and the Reorganized Company are authorized to make or cause to be made any necessary typographical or clerical corrections, to fill in any blanks and to make any clarifying or conforming changes in such documents which do not materially change the substance thereof.

103. *Approval of Fiduciaries and Agents.* The following fiduciaries and agents to carry out the Plan are hereby approved:

Position	Name of Fiduciary or Agent
Trustee under the Master Trust Agreement	National City Bank, Cleveland
Principal Transfer Agent and Principal Registrar for Certificates of Capital Stock	AmeriTrust Company
Co-Transfer Agent and Co-Registrar for Certificates of Capital Stock	The Bank of New York

Exchange Agent for Claims in The Bank of New York
Classes G-1, G-2 and H
(Income Debentures only)

The Reorganized Company's acting as its own exchange agent in respect of Claims in Classes A, B, C, D, E, F and H (other than Income Debentures) is hereby approved.

II. CONSUMMATION DATE

201. *Consummation Date.* "Consummation Date", as defined in Section 1.31 of the Plan, shall be November 30, 1982.

202. *Closing and Opening Books.* The Debtor's Trustee shall cause the books and accounts of the Debtor to be closed as of 11:59 P.M., E.S.T., on the Consummation Date. The books and accounts of the Reorganized Company shall be opened as of 12:00 A.M., E.S.T., on the day following the Consummation Date.

III. TRANSFER OF PROPERTIES AND DISCHARGE

3.01. *Vesting or Transfer of Properties.* Effective as of the Consummation Date all right, title and interest of the Debtor's Trustees in and to the property and estate of the Debtor, of every name and nature, shall, the laws of any state or the decision or order of any state authority to the contrary notwithstanding, be transferred to, vest in and become the absolute property of the Reorganized Company subject, as to cash and cash equivalents, to the provisions of the Master Trust Agreement and, in the case of the special accounts referred to in Section 2.01 of said Agreement, to the obligations to make payments therefrom for the purposes for which such accounts were established, and shall, except as satisfied or expressly assumed as provided in paragraph 6.03 below, be free and clear of all claims, rights, demands, interests, liens and encumbrances of every kind and character, whether or not properly or timely filed and whether or not approved, acknowledged or allowed in these proceedings, of the Debtor, its creditors, claimants and stockholder(s), including, without limitation, all liens and encumbrances

which have attached to proceeds from the sale of any property of the Debtor or the Trustees.

3.02. *Conveyance from the Trustees of the Debtor.* In furtherance and in confirmation of the transfer to the Reorganized Company of the assets and properties described in paragraph 3.01 above, the Trustees of the property of the Debtor, or their designees, are authorized and directed to execute and deliver to the Reorganized Company a deed transferring to it all such assets and property, effective as of the Consummation Date. Such deed will be substantially in the form approved in paragraph 1.01(h) above. The Trustees of the property of the Debtor, or their designees, are authorized and directed prior to the Consummation Date, and such persons as the Trustees may be instrument in writing designate to act on behalf of the Trustees are authorized and directed after the Consummation Date, if necessary, to execute and deliver to the Reorganized Company any and all such further deeds, conveyances, bills of sale, assignments, transfers and other instruments as may be necessary or proper for more fully and certainly conveying, assigning, transferring and delivering to the Reorganized Company all of the right, title and interest of the Trustees of the Debtor in and to the properties formerly of the Debtor.

3.03. *Disposition Of Funds Held By Trustees, Indenture Trustees, Paying Agents, etc.* Without limiting the generality of paragraph 3.01 above, effective as of the Consummation Date, all of the funds held by the Trustees in such capacity and all of the funds of the Debtor including without limitation (i) funds heretofore deposited by the Trustees, the Debtor or their predecessors for the payment or partial payment of interest or interest coupons, (ii) funds representing proceeds from sales of properties of the Debtor and (iii) funds held pursuant to orders of this Court by any and all indenture trustees, paying agents, escrow agents or fiduciaries, shall vest absolutely and without restriction in the Reorganized Company and shall be paid over by each such person holding any such funds to or upon the order of the Reorganized Company. Such payments to or upon the

order of the Reorganized Company shall be good and sufficient discharge of any liability of any such person for such funds or the application thereof.

304. *Discharge and Release of Claims.* In view of the provisions of Section 6.03 below relating to the payment, assumption or satisfaction by the Reorganized Company of certain claims, the Debtor and the Debtor's Trustees shall, as of the Consummation Date, be discharged and released forever from

(a) all obligations, debts, liabilities and claims against the Debtor, whether or not filed or presented, whether or not approved, acknowledged or allowed in these proceedings and whether or not provable in bankruptcy, including without limitation all claims assumed or guaranteed by the Debtor or enforceable against the property of the Debtor;

(b) all obligations, debts, liabilities and claims arising from costs and expenses of administration, whether or not filed or presented and whether or not approved, acknowledged or allowed in these proceedings, including without limitation all taxes, assessments, claims and other charges of governmental units or agencies, whenever assessed, accruing prior to the Consummation Date; and

(c) all obligations, debts, liabilities and claims with respect to all bonds, coupons, debentures, notes, certificates, evidences of indebtedness, shares of stock, securities and leases (including interest accrued and dividends declared), without limitation as to their nature and whether made, assumed or guaranteed by the Debtor or the Debtor's Trustees or enforceable against either of them or the property of either of them.

3.05. *Discharge and Release of Mortgages and Indentures.* All mortgages, indentures, collateral trust indentures and other instruments entered into by the Debtor, or its predecessors, that now constitute or heretofore constituted a lien on any of the property of the Debtor, other liens of record on such property, all mortgages, indentures, collateral trust indentures or instruments supplementing or modifying the same, as

well as the indenture under which the Erie Railroad Company Income Debentures were issued, and all covenants therein contained shall, as of the Consummation Date, become, and thereafter forever remain, satisfied, discharged, released, cancelled, null and void and of no effect whatever. All right, title and interest of the respective trustees of mortgages and indentures secured by liens on the property of the Debtor are hereby transferred to and vested in the Reorganized Company as of the Consummation Date. In furtherance and confirmation of such discharge and release of mortgages and indentures, each trustee or successor thereto now acting under such mortgages, indentures, collateral trust indentures or other instruments is hereby authorized and directed to execute and deliver as of the Consummation Date an instrument of release, discharge and satisfaction substantially in the form approved in paragraph 1.01 above. Each such trustee is also authorized and directed to execute and deliver as of the Consummation Date adequate deeds or instruments of release, discharge, transfer, conveyance and satisfaction to assure that properties conveyed by the Debtor or its predecessors prior to the commencement of reorganization proceedings to good faith purchasers will be free and clear of all liens and claims, and to take all such action as the Trustees and the Reorganized Company may request to enable such deeds or other instruments to be duly recorded. Whether executed before or after the Consummation Date, each of said instruments shall be effective as of the Consummation Date. From and after the Distribution Date fixed in respect of claims in Classes G-1, G-2 and H (Income Debentures only), upon compliance with the provisions of this paragraph 3.05, each such mortgage and indenture trustee shall be discharged as a trustee and relieved of all its obligations, responsibilities and duties, other than its obligations under Section 7.9 of the Plan as to holdbacks, its obligations under such mortgage or indenture in respect of lost or destroyed obligations issued thereunder, to the extent required to complete distributions under the Plan as set forth in subdivision F of the Letter of Instructions to Exchange Agent approved in paragraph 1.01(e) above, and any such other obligations under such mortgage or indenture as the trustee

thereunder would have after the execution of a release and satisfaction thereof in accordance with its terms. Each trustee or successor thereto acting under such mortgages and indentures is authorized and directed to transfer, convey, release and deliver to or upon the order of the Reorganized Company as of the Consummation Date all sums of money in its hands, or subject to its disposition, as trustee, paying agent, escrow agent or fiduciary, as provided in paragraph 3.03 above, and all shares of stock, evidences of indebtedness, other securities, credits, chooses in action and other property, rights and interests of every kind or description held or claimed by it as trustee, paying agent, escrow agent or fiduciary. The execution of instruments and the transfer and delivery of properties pursuant to this paragraph 3.05 shall be solely for the purpose of releasing and conveying to the Reorganized Company whatever interest such trustees have as trustees, paying agents, escrow agents or fiduciaries, and no personal covenant or liability shall be implied against or be assumed or undertaken by any such trustee by virtue of compliance with this Order. Each such trustee and successor thereto is hereby further authorized and directed, from time to time after the Consummation Date, to execute all such other and further instruments of discharge, release, satisfaction, transfer, conveyance or assignment and to make all further transfers and deliveries as may be necessary or desirable for more fully and certainly vesting in the Reorganized Company all right, title and interest of such trustees and for more fully and certainly accomplishing the release, discharge, cancellation and satisfaction of the instruments under which such trustees were respectively appointed and acting.

3.06. *Cancellation or Destruction.* The Reorganized Company is hereby authorized, from time to time, to cause the cancellation or destruction of all bonds, coupons, debentures, notes, certificates, evidences of indebtedness, and other securities or evidences of interest therein (i) that evidence claims surrendered to the Reorganized Company by any of the holders

of such instruments for exchange for cash payable and/or securities issuable under the Plan or (ii) that were issued under any of the mortgages, indentures, or agreements referred to in paragraph 3.05 above.

3.07. *Discharge of Trustees.* (a) The periodic reports of revenues and expenses and balance sheets filed prior to the date of this Order by the Debtor's Trustees are hereby accepted and approved. As of the Consummation Date, the Debtor's Trustees shall be discharged and relieved of any further duties and responsibilities as such in respect of the administration of the property or the conduct of the business and affairs transferred to the Reorganized Company on the Consummation Date. Thereupon, the Trustees as such shall no longer have any power and authority or duties and responsibilities to take any action on behalf of or in respect to the Reorganized Company or in respect of the implementation of the Plan, provided, however, that the Trustees may be directed to prepare a final report.

(b) Any person who failed, as required by Order No. 1209 setting a hearing on the Petition, to file, within the time frame provided thereby, any claim or action of any nature against either of the Trustees of the Debtor, in his personal capacity, based on any alleged act or failure to act in respect of the administration of the Debtor prior to the date of entry of said Order, shall be forever barred from asserting the claim or action against such Trustees, or either of them, the Debtor or the Reorganized Company. The Trustees of the property of the Debtor, the Debtor and the Reorganized Company shall be forever discharged and released from any liability with respect to all such claims or actions. Any such claim or action which may arise subsequent to the date of entry of Order No. 1209 and prior to the Consummation Date shall be filed with the Court and served upon the Trustees and the Reorganized Company on or prior to December 30, 1982 or be forever barred. Any such claim or action shall be in writing and shall state with particularity the nature of the claim or action and the relief sought. The Debtor's Trustees shall publish a notice, within 14 days after the date of this Order, in

the newspapers described and listed in Order No. 1221, confirming the Plan, stating that such claims or actions must be filed or be forever barred.

IV. CAPITALIZATION; DISTRIBUTION OF CASH AND NEW SECURITIES

4.01. *Capitalization of the Reorganized Company.* The Reorganized Company is authorized to issue Capital Stock up to 1,500,000 shares without par value, but only for the purposes of carrying out the Plan. In making the last updating of Exhibit D to the Plan prior to the Consummation Date pursuant to the fourth paragraph of Section 4.2 of the Plan, the "Claim" under each issue of the Debtor's outstanding obligations shall include interest, to the extent allowed, to the Distribution Date fixed for Class G-1 and Class G-2 Claims, as contemplated in Section 5 of the Plan.

4.02. *Indenture Trustee Holdback.* Each Indenture Trustee under an indenture referred to in Section 7.9 of the Plan shall provide the Debtor's Trustees in writing not later than 15 days from the date of entry of this Order with such Indenture Trustee's estimate of its claim, if any, under Section 77(c)(12) of the Bankruptcy Act for reasonable compensation and expenses in respect of each such indenture for which it acts as Indenture Trustee. If any Indenture Trustee fails so to provide such estimate, it shall not be entitled to the benefit of the "Cash Holdback" or "Holdback" of securities provided for in said Section 7.9 based on any amount in excess of the amount estimated by such Indenture Trustee in its most recent filing of such an estimate with the Debtor's Trustees prior to the date of entry of this Order.

4.03. *Fixing of Distribution Dates; Notice of Distribution of Cash and Securities.* As provided in Section 7.5 of the Plan, the Debtor's Trustees shall fix the Distribution Date, as defined in the Plan, for the distribution of cash and securities to holders of claims in each of the classes of claims denominated Class B through Class H. As promptly as practicable, but not later than

required by said Section, the Trustees or the Reorganized Company shall publish, as provided in said Section, a Notice of Exchange and Availability on the Distribution Date of Cash and Securities (Notice), substantially in the form approved pursuant to paragraph 1.01(e) above, and shall cause to be mailed a copy of the Notice to each recordholder of bonds or debentures of the Debtor or a predecessor and to each person at his last known address who has advised the Debtor's Trustees that he is an owner of a bond or debenture in coupon form. The Trustees shall take such steps as may be necessary and desirable to close, as of the Distribution Date fixed in respect of claims in Classes G-1, G-2 and H (Income Debentures only), the transfer books and registers in respect of such bonds and debentures, and to record, as promptly as practicable, after the Distribution Date, all trades and transfers of such bonds and debentures which occur prior to such closing. Additionally, as promptly as practicable but not later than required by Section 7.5 of the Plan, the Trustees or the Reorganized Company shall cause to be mailed to all holders of liquidated claims in Classes B, C, D, E, F and H (other than Income Debentureholders) letters substantially in the form approved pursuant to paragraph 1.01(f) above.

4.04. Issuance and Delivery of New Securities and Payment of Cash.

(a) The Reorganized Company and the fiduciaries and agents referred to in paragraph 1.03 above shall, as promptly as practicable and in accordance with the instructions of the Reorganized Company given pursuant to the provisions of this Order and the Plan, execute the instruments related to the creation, issuance and delivery of the securities of the Reorganized Company substantially in the respective forms approved in paragraph 1.01 above and authenticate, issue and deliver the new securities in accordance with and as contemplated by the documents approved in paragraph 1.01 above and in accordance with the provisions of the Plan, all subject to and in accordance with the provisions of this Order.

(b) The Capital Stock shall be issued and delivered to the Registrar or co-Registrar as of the Consummation Date. In the case of Capital Stock to be issued to holders of claims in Class G-2

and to holders of Income Debentures in Class H, the certificates shall be countersigned by the co-Registrar which is acting as the Exchange Agent and held by the Exchange Agent for distribution to the claimants. In the case of Capital Stock to be issued to all other claimants, the certificates shall be countersigned by the Registrar and delivered upon requisition to the Reorganized Company for distribution to the claimants.

(c) As of the Consummation Date, the Reorganized Company shall deposit with the Trustee of the Master Trust Agreement all cash and cash equivalents required to be so deposited by the terms of said Agreement after retaining \$6,000,000 for Working Capital.

(d) (i) From and after such Distribution Date or Dates as shall be established for Classes G-1, G-2 and H (Income Debentures only), the Exchange Agent shall, in accordance with the Letter of Instructions referred to in paragraph 1.01(e) above, make delivery of checks for cash and/or of new securities in the respective amounts provided in the Plan to holders of securities of the Debtor or a predecessor as of the Consummation Date upon proper surrender of such old securities and (ii) from and after such Distribution Date or Dates as shall be established for Classes B, C, D, E, F and H (excluding Income Debentures) the Reorganized Company shall, in accordance with the Memorandum of Instructions referred to in paragraph 1.01(f) above, make delivery of checks for cash and/or of new securities in the respective amounts provided in the Plan to claimants in such Classes upon execution and delivery of releases substantially in the forms approved in said paragraph 1.01(f); provided, however, that all such distributions shall be subject to the pre-condition to distribution set forth in Section 8.1 of the Plan.

(e) The issuance, transfer and exchange of new securities and the execution, delivery, filing and recording of documents, as authorized and provided in this Order and the documents herein approved, are all pursuant to the Plan, which has been confirmed by this Court in accordance with the provisions of Section 77 of the Bankruptcy Act and Section 601 of the Regional

Rail Reorganization Act of 1973 and are for the purposes of carrying out and putting into effect the Plan. No further authorization or approval by any court or administrative, regulatory or other body is required for such purposes or for the validation of any securities issued and actions taken pursuant to this Order.

4.05. *Termination of Right to Receive Cash and/or New Securities Under the Plan.* The rights of all security holders, creditors and claimants to receive cash and/or new securities, upon the surrender of old securities or execution of release and satisfaction forms, as provided in the Plan and this Order, shall terminate as provided in Section 8.7 of the Plan. Any cash and new securities issued but not distributed and any interest, dividends or distributions thereon not distributed within the period of time specified in said Section shall become the sole and exclusive property of the Reorganized Company, and all shares of stock shall become treasury shares, free and clear of any right, title and interest other than that of the Reorganized Company, the escheat or abandonment of property laws of any state to the contrary notwithstanding. Not less than 60 days and not more than 90 days before the fifth anniversary of the Consummation Date, the Reorganized Company shall cause to be published a notice that the right to receive cash and new securities as provided in the Plan shall terminate, subject to the exception referred to in Section 8.7 of the Plan for claims which are approved, acknowledged or allowed after the fourth anniversary of the Consummation Date. Such notice shall be published at least once in each of the newspapers named in Section 7.5 of the Plan, or, if any such newspaper is no longer published, in another newspaper in the same city or area.

V. EXECUTION AND RECORDATION OF DOCUMENTS

5.01 *Execution and Delivery of Documents.* The Debtor's Trustees or either of them, or such person as the Trustees may by resolution designate, are hereby authorized and directed to execute and deliver or to have executed and delivered the documents approved in paragraph 1.01 above to which they are parties, except that the Restated Certificate of Incorporation of the

Reorganized Company and related certificate eliminating capital referred to in said paragraph shall be executed and filed as provided in paragraph 6.01 below, and to execute and deliver or to have executed and delivered all such other conveyance documents, bills of sale, assignments and other instruments as may be necessary and proper to convey, assign and transfer all of the right, title and interest of the Debtor and the Debtor's Trustees in and to the properties to be vested in the Reorganized Company as required by Part III of this Order above. Whether executed before or on or after the Consummation Date, each of said instruments shall be effective as of the Consummation Date. The Reorganized Company shall, on or as soon after the Consummation Date as is reasonably practicable, execute and deliver or have executed and delivered the documents approved in paragraph 1.01 above to which it is a party. The Master Trust Agreement shall be and become effective as of the Consummation Date, irrespective of the actual date of execution and delivery thereof.

5.02 Recording and Filing of Documents.

(a) The Reorganized Company is authorized and directed to file or record, as soon as possible but in any event not later than February 28, 1983.

(i) in each of the jurisdictions in which the Reorganized Company owns real property, a copy of this Order and a deed substantially in the form approved in Paragraph 1.01(h) above, conveying such property from the Trustees to the Reorganized Company; and (ii) in each of the jurisdictions in which the Reorganized Company owns real property or in which any indenture or mortgage of the Debtor or any predecessor released and discharged pursuant to Paragraph 3.05 above was previously recorded, a copy of this Order and an instrument of satisfaction, substantially in the form approved in Paragraph 1.01(g) above, relating to each such indenture or mortgage; provided, however, that this Order need not be filed and recorded more than once in any such jurisdiction.

(b) The recording officer of each jurisdiction referred to in paragraph 5.02(a) above shall, upon presentation of a duly executed counterpart thereof, accept for filing or recording, as appropriate, any or all of the documents referred to in said paragraph.

(c) If the recordation or taxation laws or regulations of any jurisdiction require that the documents referred to in paragraph 5.02(a) above contain real property descriptions which are more specific than or otherwise differ from those contained in such documents, such person or persons as the Debtor's Trustees may by resolution designate are authorized and directed to execute and deliver and the Reorganized Company is authorized and directed to file and record, as soon after the Consummation Date as is reasonably practicable, amendatory or supplemental deeds or other documents which comply with such laws or regulations.

VI. ONGOING OPERATION OF THE REORGANIZED COMPANY

6.01 *Filing of Restated Certificate of Incorporation.* The Restated Certificate of Incorporation of the Reorganized Company, in the form approved in paragraph 1.01 above, and the related certificate eliminating capital referred to in said paragraph and the amendments and changes effected thereby are authorized by the Plan and are necessary and proper to put the Plan into effect and are hereby approved and authorized. The Debtor's Trustees are hereby authorized and directed to file with the Secretary of State of the state of Delaware, pursuant to this Order, such Restated Certificate of Incorporation and related certificate which may be executed by the Debtor's Trustees, or their designee, and shall be effective as of the Consummation Date. After the filing and effectiveness thereof the Certificate of Incorporation of Erie Lackawanna Railway Company shall, for all purposes be deemed amended in accordance with said Restated Certificate, including the change of name of said Company to Erie Lackawanna Inc.

6.02 *Qualification to do Business in Other States.* Prior to the Consummation Date, the Debtor's Trustees are authorized,

on behalf of the Reorganized Company, to execute and acknowledge appropriate certificates, or amendatory certificates in respect of the various certificates presently qualifying the Debtor, to do business in the following jurisdictions in conformance with the Restated Certificate of Incorporation of the Reorganized Company and in accordance with the provisions of the applicable statutes in the respective jurisdictions, and to file such certificates or amendatory certificates, as the case may be, and other appropriate documents with the proper authority of the respective jurisdictions: New Jersey, New York, Ohio and Pennsylvania. After the filing of such certificates or amendatory certificates, the Reorganized Company shall be qualified to do business in such jurisdictions in accordance with the provisions of such certificates or amendatory certificates.

6.03 *Assumed Obligations.* (a) The claims of creditors and claimants in respect of obligations or securities of the Debtor or the Debtor's Trustees will be satisfied as provided in the Plan, subject, however, to the provisions of this Order relating to the payment or satisfaction of such claims. Any timely-filed claim, including claims in respect of disaffirmed executory contracts against the Debtor or the Debtor's Trustees, and contingent claims in respect of guarantees by the Debtor of bonds of any company against the Debtor or the Debtor's Trustees included in a class provided for in the Plan but not liquidated in amount, settled, determined, classified, approved, acknowledged, allowed or adjudicated to be valid until after the Consummation Date will be satisfied pursuant to the Plan in the same manner as if such claim had been so adjudicated or otherwise liquidated prior to the Consummation Date. Without limiting the generality of the foregoing, the Reorganized Company shall pay in cash as soon as practicable all claims in respect of costs and expenses of reorganization of the Debtor allowed by this Court in accordance with the provisions of Sections 77(c)(2) and 77(c)(12) of the Bankruptcy Act, all Reorganization Expenses as defined in the Plan and all other claims classified as Class A Claims under the Plan. All such claims to be paid in cash in whole or in part shall be paid from funds subjected to the Master Trust Agreement.

(b) The Reorganized Company is authorized and directed to pay, out of Working Capital, expenses incurred by the Debtor's Trustees after the Consummation Date in their performance of any of the duties imposed by this Order or by any other order of the Court and to provide staff and other support services required by the Trustees in the performance of such duties.

(c) As of the Consummation Date, the Board of Directors of the Reorganized Company is authorized and directed, by adoption of resolutions in the forms approved in paragraph 1.01 above, (i) to indemnify from certain liabilities and expenses the Debtor's Trustees, their officers and employees and other specified persons serving at their request or whom they have agreed to indemnify, and (ii) to establish regulations as to responsibilities of directors, officers and employees.

(d) The Reorganized Company is authorized and directed to assume each executory contract of the Debtor recommended for affirmance in the "Petition and Report of the Debtor's Trustees With Respect to Pre-Bankruptcy Executory Contracts", Document No. 3466. Subject to and except as provided in Section 8.4 of the Plan, all pre-bankruptcy executory contracts not so assumed are disaffirmed and rejected, effective as of the Consummation Date but relating back to the date of filing by the Debtor of its petition for reorganization, and the Reorganized Company shall have no responsibility to carry out the terms of such contracts. On or prior to November 12, 1982, the Debtor's Trustees shall publish a notice in the newspapers described and listed in Order No. 1221 confirming the Plan, in the form approved in paragraph 1.01(k) above, and shall serve a copy of said Notice by mail on all known parties to executory contracts, or contracts which may be executory, which the Trustees prior to the filing of said Petition and Report specifically disaffirmed with approval of the Court or as to which they have previously given specific notice of disaffirmance subject to Court approval but as to which the Court has not yet acted.

(e) As of the Consummation Date, the Reorganized Company is authorized and directed to assume and comply with all agreements of the Trustees for the sale of property which have been approved by the Trustees or their designees and which, but

for the occurrence of the Consummation Date, would have been consummated by the Trustees pursuant to a final order specifically authorizing such sale or a general order authorizing sales if the consideration is less than a specified amount.

6.04 *Pending Litigation.* If the Reorganized Company so elects, it shall be substituted at its own cost and expense as a party in lieu of the Debtor's Trustees in any and all litigation to which the Trustees may be parties on the Consummation Date and may continue such litigation in the name of the Reorganized Company.

6.05 *Personnel Arrangements.* The Reorganized Company is authorized and directed to offer employment with the Reorganized Company to the employees who are on the staff of the Debtor's Trustees on the date of this Order without interruption by reason of the transfers of property or other transactions pursuant to the Plan and this Order. The Reorganized Company will provide the employment so offered and will honor all contracts of employment in effect immediately prior to the Consummation Date, on the terms contained therein, made by the Debtor's Trustees pursuant to the authorization granted in Order No. 1130. Subject to such contracts of employment, such employees may be assigned to either new or continuing functions and shall serve at the pleasure of the Board of Directors of the Reorganized Company or its designees. The Reorganized Company is directed to assume and continue the presently-existing undertakings of the Debtor's Trustees to provide benefits to present employees, including without limitation (i) retirement benefits and (ii) group medical and dental coverage.

6.06. *Registration of Securities.* The Debtor's Trustees and the Reorganized Company are authorized and directed to file with the Securities and Exchange Commission under the Securities Exchange Act of 1934, and with any other securities commissions or authorities, such documents, and to pay such fees, as may be required to comply with the applicable law concerning the new securities by the Reorganized Company.

VII. FURTHER PROCEEDINGS

7.01. *Implementation of Plan.* Under and subject to the supervision and control of this Court and pursuant to the terms of this Order and the Plan, the Reorganized Company is authorized and directed, as promptly as possible, to effectuate the consummation of the Plan, the laws of any state or the decision or order of any state authority to the contrary notwithstanding. To the extent that the provisions of any prior orders of this Court may be inconsistent with the provisions of this Order or the Plan or the effectuation thereof, such provisions of such prior orders are superseded, but any action taken pursuant to or in reliance upon any such superseded provision shall not be affected by this paragraph 7.01.

IT IS SO ORDERED.

/s/ Robert B. Krupansky

United States Circuit Judge
United States Court of Appeals
for the Sixth Circuit
Sitting by Designation

**THE UNITED STATES DISTRICT COURT
THE NORTHERN DISTRICT OF OHIO
EASTERN DISTRICT**

In the matter of
ERIE LACKAWANNA RAILWAY COMPANY,

Debtor

In Proceedings for the Reorganization of a Railroad

No. B72-2838

ORDER NO. 1235

FINAL DECREE

On July 12, 1982, by Order No. 1190 this Court approved the Plan of Reorganization of Erie Lackawanna Railway Company as amended to July 12, 1982 (Plan), pursuant to Section 77(e) of the Bankruptcy Act. Amendment No. 1 to the Plan [Document No. 3466, Exhibit 1], relating to executory contracts, was approved in Order No. 1218.

On September 20, 1982, the Petition of Trustees and Reorganization Managers of the Debtor for Entry of Orders Confirming and Authorizing Consummation of Plan of Reorganization and of Final Decree (Document No. 3471) (Petition) was filed with this Court. This Court conducted a duly noticed hearing upon the Petition following which, on October 29, 1982, Orders No. 1221 and No. 1222 were issued respectively confirming and approving consummation of the Plan. Pursuant to paragraph 2.01 of Order No. 1222 it was determined that the "Consummation Date," as defined by the Plan in Section 1.31, would be November 30, 1982.

Accordingly, and upon consideration of the Petition, the responses thereto, and the entire record in these proceedings, and

it appearing the Plan of Reorganization of Erie Lackawanna Railway Company as amended to July 12, 1982 has been consummated this date, November 30, 1982 (Consummation Date),

It is hereby ORDERED that:

1. The effect of confirmation and consummation on the creditors and stockholder(s) of the Debtor shall be as provided in Order No. 1222, Consummation Order, entered by the Court on October 29, 1982.

2. As provided in said Order, the Trustees of the Debtor are hereby discharged as of the Consummation Date, except however, that the Trustees are authorized and directed to prepare a final report as set forth below.

3. All persons, firms, governmental entities and corporations, wherever situated, located or domiciled, are hereby permanently restrained and enjoined from instituting, prosecuting or pursuing, or attempting to institute, prosecute or pursue, any suits or proceedings, at law or in equity or otherwise, against the Reorganized Company, its successors or assigns or against any of the assets or property of the Reorganized Company, its successors or assigns, directly or indirectly, on account of or based upon any right, claim or interest of any kind or nature whatsoever which any such person, firm, governmental entity or corporation may have in, to or against the Debtor, or the Debtor's Trustees or any of their assets or properties, and from interfering with, attaching, garnishing, levying upon, enforcing liens against or upon, or in any manner whatsoever disturbing any portion of the property, real, personal or mixed, of any kind or character, on or at any time after the Consummation Date in the possession of the Reorganized Company and from interfering with or taking steps to interfere with the Reorganized Company, its officers and agents, or the operation of the properties or the conduct of the business of the Reorganized Company, by reason of or on account of any obligation or obligations incurred by the Debtor or the

Debtor's Trustees in these proceedings, except the obligation imposed on the Reorganized Company by the Plan and this Order or reserved for resolution or adjudication by the Plan or this Order. All persons, firms, governmental entities and corporations, wherever situated, located or domiciled, are hereby permanently restrained and enjoined from instituting, prosecuting or pursuing, or attempting to institute, prosecute or pursue, any suit or proceeding, at law or in equity or otherwise, against either or both of the Debtor's Trustees in their personal capacity on account of or based upon any right, claim or interest of any kind or nature whatsoever which is or shall be barred by the provisions of paragraph 3.07(b) of the Consummation Order. All persons, firms, governmental entities and corporations, wherever situated, located or domiciled, are hereby restrained and enjoined from instituting, prosecuting or pursuing, or attempting to institute, prosecute or pursue, any suit or proceeding, at law or in equity or otherwise, against the Debtor or any of its assets or property, directly or indirectly, except such suits or proceedings as may be for the purpose of carrying out this Order or consummating the Plan. Nothing in this paragraph should be construed, interpreted or applied to limit the right of any person, firm, governmental entity or corporation, wherever situated, located or domiciled, from instituting, prosecuting or pursuing any suit or proceeding, at law, equity or otherwise, against the Debtor, or its assets or property, directly or indirectly, which is within the original and exclusive jurisdiction of the Special Court established pursuant to Section 209(b) of the Regional Rail Reorganization Act of 1973, as amended. Any other provision of this Order to the contrary notwithstanding, the consummation of the Plan and any action taken pursuant to the Consummation Order or this Order shall not prejudice the rights of appellants to prosecute appeals which may be taken from the Confirmation Order, the Consummation Order or this Order.

4. From and after the Consummation Date, the Court hereby reserves jurisdiction, which shall be exclusive to the extent that under applicable law such jurisdiction is currently exclusive, as to all matters set forth in Section 7.8 of the Plan, and in addition thereto,

(i) To consider and approve the final report of the Debtor's Trustees as provided in paragraph 5 below;

(ii) To the extent not previously determined by this Court, to fix the amounts of allowances of compensation for services heretofore or hereafter rendered and reimbursement of expenses heretofore or hereafter incurred under Sections 77(c)(2) and 77(c)(12) of the Bankruptcy Act in connection with these proceedings or the Plan or the execution of the Consummation Order;

(iii) To consider and act in respect of any claim of the Debtor or the Debtor's Trustees in respect of any petition or matter pending before the Court as of the Consummation Date or in respect of any agreement or matter to which the Trustees are or the Debtor is a party, as to which the Court currently has asserted jurisdiction and which has not been adjudicated, discharged, resolved or terminated as of the Consummation Date.

(iv) To consider and act in the matter of (a) any claim or action against the Trustees of the Debtor, in their personal capacities, including claims or actions filed pursuant to paragraph 3.07 of the Consummation Order, or actions against the officers or employees of the Trustees, or persons who have served as directors of any company at their request, arising out of any act or omission of any such person in respect of the administration of the Debtor during the reorganization proceedings, and (b) any application of such Trustee, officer, employee, or person who served as director, for indemnification from liabilities and expenses in respect

of such actions, or any other actions in which such individuals are personally involved, pursuant to the indemnification resolution approved in paragraph 1.01 of the Consummation Order and adopted by the Reorganized Company pursuant to paragraph 6.03(c) of the Consummation Order;

(v) To consider and act on any application for instructions with respect to the distribution of funds or the issuance of securities in connection with this Order and the Plan, and to consider and act upon any matter as to which jurisdiction is reserved by the Plan, the Master Trust Agreement, or this Order; and

(vi) To consider and take appropriate action with respect to the matters referred to in paragraph 3 above, including action to enforce injunctive provisions of that paragraph.

5. On or prior to February 28, 1983, the Debtor's Trustees shall file with the Court a final report, certified by a firm of independent public accountants, consisting of a statement of revenues and expenses covering the period commencing January 1, 1982 and ending November 30, 1982 and a balance sheet as of November 30, 1982, the Consummation Date. On or before May 30, 1983, the Reorganized Company shall file with the Court a report stating the progress made in the consummation of the Plan and summarizing the claims which have not been surrendered or released in accordance with the Plan and the Consummation Order.

6. Except as provided in paragraph 4 above, all jurisdiction of this Court in or by reason of these proceedings

shall be terminated and these proceedings shall be closed effective as of November 30, 1982, the Consummation Date.

IT IS SO ORDERED.

United States Circuit Judge
United States Court of Appeals
for the Sixth Circuit
Sitting by Designation

ERIE LACKAWANNA INC.**Dec. 31, 1985****DELOITTE HASKINS & SELLS****TOTAL ASSETS:**

149,701

NET WORTH:

94,044

TOTAL SALES:

14,769

NET INCOME OR LOSS:

8,042

CONSOLIDATED FINANCIAL STATEMENTS**ERIE LACKAWANNA INC. AND SUBSIDIARIES
CONSOLIDATED BALANCE SHEETS****December 31, 1985 and 1984**

	1985	1984
Assets		
Current Assets:		
Cash and temporary cash investments	\$ 3,575	\$ 5,500
Accounts and notes receivable	258	252
Tax refund receivable	1,001	1,001
Total	4,835	6,753
Funds on Deposit under Master Trust Agreement (Note 3):		
For payment of creditor claims from reorganization.	11,419	12,997
For possible Federal income taxes (Note 6)	39,600	58,585
For possible unliquidated claims and contingencies (Note 7)	3,615	3,766
Other (excess reserve)	85,755	55,898
Total	<u>140,390</u>	<u>131,247</u>
Other Funds	1,310	1,300
Notes Receivable from Property Sales —		
Non-Current	501	365
Investments (Note 2)	909	909
Properties (Note 2)	1,545	549
Other Assets	209	210
Total Assets	<u>\$149,701</u>	<u>\$140,337</u>

	1985	1984
Liabilities and Shareholders' Equity		
Current Liabilities:		
Federal and State Income Taxes	\$ 1,778	\$ 1,522
Other accrued expenses	410	496
Total	2,188	2,019
Liabilities Payable from Funds on Deposit under Master Trust Agreement:		
Creditor claims from reorganization (Note 4)	11,419	12,997
Accrual for Possible Federal Income Taxes (Note 6) ..	39,600	58,585
Other Liabilities, including deferred income taxes ..	1,443	887
Total Liabilities	54,651	74,489
Excess of Carrying Value of Assets (Note 2)	1,005	1,830
Contingencies (Note 7)		
Shareholders' Equity:		
Capital Stock without par value, \$1 per share stated value; authorized 1,500,000 shares; 1985 — 854,157 shares issued, 72,205 shares yet to be issued under the Plan of Reorganization; 1984 — 847,687 shares issued, 78,675 shares yet to be issued (Note 5)	926	926
Additional capital (Note 5)	70,322	51,337
Retained earnings (from December 1, 1982)	22,795	14,752
Total Shareholders' Equity	94,044	67,017
Total Liabilities and Shareholders' Equity	\$149,701	\$143,337

The accompanying notes to consolidated financial statements are an integral part of these statements.

ERIE LACKAWANNA INC. AND SUBSIDIARIES CONSOLIDATED STATEMENTS OF INCOME AND RETAINED EARNINGS

For the Years Ended December 31, 1985, 1984 and 1983

	1985	1984	1983
Income:			
Interest	\$13,179	\$14,418	\$11,603
Other	1,590	1,956	1,896
Total income	14,769	16,375	13,499
Expenses:			
Salaries and related expenses	642	627	723
Legal and professional	680	545	550
Property taxes	38	142	181
Other	(2)	108	324
Total expenses	1,359	1,425	1,780

	1985	1984	1983
Income Before Provision for Income Taxes.....	13,410	14,950	11,718
Provision for Income Taxes (Note 6) ...	5,367	7,181	5,696
Net Income	8,042	7,769	6,022
Earnings per Share of Capital Stock (Note 8)	\$ 8.68	\$ 8.39	\$ 6.51
The accompanying notes to consolidated financial statements are an integral part of these statements.			
NET INCOME	8,042	7,769	6,022
Retained Earnings — Beginning of year.....	14,752	6,983	961
Retained Earnings — End of year	\$22,795	\$14,752	\$ 6,983

ERIE LACKAWANNA INC. AND SUBSIDIARIES
CONSOLIDATED STATEMENTS OF CHANGES IN
FINANCIAL POSITION

For the Years Ended December 31, 1985, 1984 and 1983

	1985	1984	1983
Funds (Cash and temporary cash investments and Funds on deposit under Master Trust Agreement) at beginning of year	\$136,748	\$123,855	\$165,059
Funds provided:			
Net income	8,042	7,769	6,022
Less gain on sale of assets	550	1,760	1,213
Funds provided.....	7,492	6,008	4,808
Proceeds from sale of assets	1,554	2,599	1,480
Increase in reserve for possible Federal income taxes		2,300	17,585
Decrease in:			
Tax refund receivable		3,150	2,035
Accounts and notes receivable		2,713	1,257
Other funds			1,809
Notes receivable from property sales — Non-current			3,015
Other assets		163	1,728
Other	1,175	1,004	690
Total funds provided.....	10,222	17,940	34,411

	1985	1984	1983
Funds applied:			
Decrease in creditor claims from reorganization	1,577	4,397	69,966
Payment of reorganization expenses. . . .			4,207
Other	1,427	649	1,442
Total funds applied	3,005	5,046	75,616
Increase (Decrease) in funds for the year	7,217	12,893	(41,204)
Funds (Cash and temporary cash investments and Funds on deposit under Master Trust Agreement) at end of year	\$143,965	\$136,748	\$123,855
Components of increase (decrease) in funds for the year:			
Funds on deposit under Master Trust Agreement	\$ 9,142	\$ 14,168	\$ (39,966)
Cash and temporary cash investments. . .	(1,925)	(1,275)	(1,237)
Total increase (decrease) in funds	\$ 7,217	\$ 12,893	\$ (41,204)

The accompanying notes to consolidated financial statements are an integral part of these statements.

ERIE LACKAWANNA INC. AND SUBSIDIARIES

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS

NOTE 1 — REORGANIZATION; CORPORATE PURPOSES

On June 26, 1972 Erie Lackawanna Railway Company (Debtor) entered reorganization proceedings under Section 77 of the Federal Bankruptcy Act in the United States District Court, Northern District of Ohio, Eastern Division (Reorganization Court. During the course of those proceedings, most of the rail assets of the Debtor and consolidated subsidiaries were required by statute to be conveyed on April 1, 1976 to Consolidated Rail Corporation (Conrail) or others, and payment therefor (\$230,000,000 principal and \$132,693,000 interest was received on February 25, 1982 pursuant to a settlement of valuation proceedings before a Special Court. On November 30, 1982, a Plan

of Reorganization (the Plan) of the debtor was consummated and its name was changed to Erie Lackawanna Inc. (Company).

The primary purposes of the Company are to pay remaining claims against the Debtor, liquidate its remaining assets and invest the proceeds received on the liquidation of such assets and other assets previously disposed of, and resolve through litigation or negotiation any unliquidated claims including any income tax liabilities (see note 6). Pursuant to the Plan and under the Company's Restated Certificate of Incorporation, the Company's existence will terminate on December 31, 1988, subject to extension if certain Federal income tax liabilities have not been finally determined, and the Company will be liquidated subject to the provisions of applicable law unless prior thereto, the holders of at least 75% of the shares of the Capital Stock vote to change the nature of the Company's business and extend its duration, in which case the shareholders not voting for such change will be entitled to be paid in cash the fair value of their shares as determined pursuant to the applicable laws of Delaware, the state in which the Company is incorporated.

The Company's Board of Directors has declared its intention as to a program for the Company's future. *By resolution unanimously adopted in February 1984 the Board of Directors declared its intention*, subject to no intervening material adverse problems arising and after the Company's 1982 Federal income tax liabilities have been finally determined, *promptly to recommend and submit to the Company's shareholders a proposal*, the adoption of which would require the affirmative vote of the holders of at least 75% of the shares of the Company's Capital Stock, *to amend the Company's Restated Certificate of Incorporation (a) to change the nature of the Company's business as the shareholders may determine and (b) to extend its duration*. In the event of the adoption of such proposal the shareholders not voting for such proposal would be entitled to be paid in cash the fair value of their shares as determined pursuant to the applicable laws of the State of Delaware. As part of this program, the Company would seek the approval of the Reorganization Court to withdraw funds from the Master Trust Agreement to make such fair cash value payments and for proper business purposes, but

only to the extent that amounts remaining under the Master Trust Agreement would exceed all cash reserves required to carry out the Plan.

NOTE 2 — SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES

Basis of Statement Presentation

The accompanying consolidated financial statements include the accounts of the Company and its majority-owned subsidiaries. All significant intercompany accounts and transactions have been eliminated in consolidation.

Investments

The Company's interest in less than majority-owned companies is stated as estimated realizable value as of the date of reorganization, which is not in excess of market value at December 31, 1985.

Properties

Properties consist principally of land, including abandoned rights-of-way (without tracks), all being held for disposal, for which no depreciation is required. Substantially all properties are recorded on the balance sheet at estimated realizable value as of the date of reorganization.

Excess of Carrying Value of Assets

This amount represents the excess of the estimated realizable value of properties and investments at the date of reorganization over the prior carrying value on the books of the Debtor, less amortization. This account is amortized into income as the assets are sold.

NOTE 3 — FUNDS ON DEPOSIT UNDER THE MASTER TRUST AGREEMENT; RESTRICTION ON ASSETS OF THE COMPANY

Funds on deposit under the Master Trust Agreement, including earnings thereon, and most of the other assets of the Company are restricted for the purpose of carrying out the Plan.

All proceeds from the sale of properties and investments, the collection of receivables and the conversion of any other assets into cash are required to be deposited under the Master Trust Agreement.

Funds in the Master Trust are to be used for payment of those creditors' claims payable in cash, unliquidated claims and contingencies payable in cash, Federal income taxes and, if necessary, for replenishing the working capital of the Company. Additionally, the Company may, subject to Reorganization Court approval, make withdrawals from the Master Trust for the purposes stated in note 1, to make partial liquidating distributions on the Capital Stock and to provide funds for the purchase of shares of Capital Stock under purchase offer or offers made to all shareholders, but only to the event the amounts then held in the Master Trust shall exceed all cash reserves required to carry out the Plan.

The funds classified as "Other (excess reserve)" represent the deposits under the Master Trust Agreement which exceed those allocated for the payment in cash of creditor claims, possible Federal income taxes, and possible unliquidated claims and contingencies.

Investment of the funds in the Master Trust is limited to certain types of securities. The funds allocated to reserver for Federal income tax claims and all other claims, including unliquidated claims and contingencies, payable in cash plus the excess of the principal amount of Federal income tax liabilities for the year 1982 in respect of unresolved issues over the reserve for 1982 Federal income taxes, may be invested only in U.S. Government securities, bank certificates of deposit and project notes of state or local housing agencies backed by the full faith and credit of the United States, all maturing within 12 months (Group A Investments). Other funds in the Master Trust may be invested in the Group A Investments plus high grade corporated bonds or commercial paper and general obligations of states and municipalities (Group B Investments). As of December 31, 1985, 67.6 per cent of the funds on deposit were invested in Group A Investments and 32.4 per cent in Group B Investments.

**NOTE 4 — LIABILITIES PAYABLE FROM FUNDS ON
DEPOSIT UNDER MASTER TRUST AGREE-
MENT**

Creditor Claims from Reorganization

Creditor claims from reorganization at December 31, 1985 and 1984 payable cash consist of the following:

	<u>1985</u>	<u>1984</u>
Class C — State and local tax claims	\$ 35,644	\$ 35,644
Class D — Other claims of administration . . .	724,387	1,081,219
Class F — Six month claims	31,192	58,210
Class G-1 — Claims of secured creditors which are to be paid in cash in full	7,637,048	8,457,792
Class G-2 — Cash portion of claims of secured creditors which are to be satisfied partially by cash and partially by the issuance of Cap- ital Stock	<u>2,991,576</u>	<u>3,364,511</u>
Total	\$11,419,847	\$12,997,376

All of the above claims are currently payable from funds on deposit under the Master Trust Agreement upon receipt by the Company of bonds or debentures of the Debtor or of signed creditor releases, as the case may be. Pursuant to the Plan, the rights of all securityholders, creditors and claimants to receive cash and/or Capital Stock of the Company will terminate five years after the Consummation Date of the Plan, except as to claims asserted as of the Consummation Date but not approved, acknowledged or allowed until after the fourth anniversary of the Consummation Date, will terminate one year after the date of such approval, acknowledgement or allowance.

Included in Class D Claims are \$539,000 and \$651,000, which represent the Company's estimate for claims for personal injury at December 31, 1985 and 1984, respectively. Although the Company believes the present estimate is adequate to meet such claims, subsequent settlements may require adjustments. *There is not included in the Class D claims any amount for suits, claims or notices of possible claims referred to in the third paragraph of note 7.*

NOTE 5 — CAPITAL ACCOUNTS

Changes in the Company's Capital Stock and Additional capital accounts are as follows:

	Capital Stock		
	Shares issued or issuable under the Plan	Shares issued or issuable to subsidiaries	Additional capital
Balance at December 31, 1982.	\$932,901	\$7,317	\$47,496,338
Retirement of shares issued to consolidated subsidiaries or affiliated companies	(7,700)	(7,317)	7,700
Transfer of remaining balance in accrual for reorganization expenses.			3,253,890
Other, principally adjustments to shares issued or claims paid resulting from settlements with creditors in amounts different from those accrued under the Plan, and resolution of other estimated liabilities accrued under the Plan.	1,161		579,920
Balance at December 31, 1983 and 1984.	926,362		51,337,848
Reduction of accrual for possible Federal income taxes (see note 6)			18,985,000
Balance at December 31, 1985.	\$926,362		\$70,322,848

The increase in Additional capital resulting from the transfer of the remaining balance in accrual for reorganization expenses represents the excess of the accrual at the date of reorganization over the amount subsequently allowed by the Reorganization Court.

NOTE 6 — INCOME TAXES

Commencing April 1, 1968, the Company was included through 100% stock ownership in the system of Norfolk and

Western Railway Company (N&W). While the Company incurred substantial operating losses for tax purposes after that date, all of such losses were included in the N&W system's consolidated Federal income tax returns through January 4, 1982, on which date N&W terminated the affiliation by making a gift of the then outstanding stock of the Company to an educational institution. While generally such losses would not be available to the Company, special Federal tax legislation was enacted in 1980 to provide a carryover of certain of such losses, to the extent stated below.

The tax consequences of the settlement of the valuation proceedings and of the consummation of the Company's Plan of Reorganization were included in the Company's Federal income tax return for the period January 5 through December 31, 1982. The Internal Revenue Service (IRS) has proposed substantial adjustments in connection with its examination of that return. If the Company were unsuccessful in sustaining its position on all of the unagreed issues, the tax liability for the year ended December 31, 1982, plus interest through December 31, 1985, would be approximately \$54.2 million. The Company intends to vigorously seek administrative or judicial disallowance of the proposed adjustments.

In view of the issues raised, the Company has established an accrual for possible Federal income taxes and interest thereon at December 31, 1985 of \$39.6 million, compared with \$28 million at March 31, 1985 as previously reported in the Company's Report to Stockholders for the First Quarter 1985 (see detailed explanation below).

The principal adjustments proposed by the IRS, and the related increases in tax liability, excluding interest, are (1) denial of the deductibility against interest income realized on the settlement of the valuation proceedings of certain net operating losses restored by the 1980 legislation (\$14.7 million), (2) claim of alleged income from forgiveness of indebtedness (\$14.1 million, increased in December 1985 from \$11.3 million), and (3) denial of the deductibility of certain expenses (\$13.8 million) accrued upon the approval and consummation of the Plan of Reorganization (adjustments first proposed in December 1985).

These proposed adjustments briefly are as follows:

(1) The Company in 1982 took a deduction for certain net operating loss carryovers restored by the 1980 legislation. Legal counsel has advised the Company that, in their opinion, while the question is not free from doubt, the deduction may be offset against interest income received in the settlement of the valuation proceedings. They are of this opinion notwithstanding a Technical Advice issued by the National Office of the IRS in July 1985 which held that the Company is not entitled to deduct in its 1982 consolidated Federal income tax return the net operating loss carryovers against such interest income.

Pursuant to the 1980 legislation, the amount of such carryover to which the Company would be entitled is dependent on the ultimate treatment in the N&W consolidated return of the disposition of the stock of the Company. The Company has been advised that the tax position taken by the N&W in reporting its disposition of the stock of the Company may result in a reduction of the Company's loss carryover even if the Company's position as described above is upheld, resulting in a reduction of the Company's tax benefit for this deduction from the Company's claim of \$14.7 million to \$8.9 million. The Company is not now in possession of all facts necessary to determine whether such treatment by the N&W was proper.

(2) The IRS has also proposed to increase taxable income in 1982 because of alleged forgiveness of interest expense attributable to certain obligations of the Company and certain other expenses deducted from income in 1982 and prior years, the tax effect of which would be \$14.1 million. The IRS claims the Company realized income in the amount of the excess of the accrued expenses satisfied by the issuance of capital stock over the market value of such stock when issuable, December 21, 1982. Legal counsel has advised the Company that, in their opinion, while this issue is not free from doubt, no income should be realized by the Company as a result of such transaction.

(3) The Company in 1982 claimed deductions for various expenses which were not previously accrued until the approval and consummation of the Plan of Reorganization. The IRS has

proposed disallowance in 1982 of the deduction of these expenses, claiming such expenses were properly accruable and deductible in years prior to 1982, the tax effect of which would be \$13.8 million. Legal counsel has advised the Company that, while the legal issues vary depending upon the exact nature of each expense, with respect to the majority of such expenses, more likely than not the Company should prevail in its position that these expenses were properly deducted in 1982.

The accrual for possible Federal income taxes which was \$58.6 million at December 31, 1984 was reduced to \$28 million at March 31, 1985, as stated above. This represented a reduction of \$30.6 million in tax liability. It was based on the IRS Technical Advice received by the Company in March 1985, allowing the Company to deduct against ordinary income for 1982 the amount by which the principal portion of the valuation case settlement was less than the tax basis of its assets transferred to Consolidated Rail Corporation or others. The increase from \$28 million to \$39.6 million in the accrual for possible Federal income taxes at December 31, 1985 is attributable principally to the disallowances proposed by the IRS in December 1985, as stated above. The adjustments described herein have been credited/charged to the Additional capital account (See note 5).

The provisions for Federal income taxes as recorded on the books for the years ended December 31, 1984 and 1983 represent the liability which would be payable without the benefits of any loss carryover. Although the Company claimed the benefit of a loss carryover in its 1984 and 1983 tax returns, the benefit has not been recorded on the books because its ultimate availability is dependent upon the favorable outcome of the Company's contest of the adjustments proposed by the IRS in the Company's 1982 tax return.

The IRS has proposed adjustments in connection with its examination of the Company's 1983 and 1984 tax returns, the amounts of which are not material.

A reconciliation between the statutory tax rate and the Company's effective tax rate is as follows:

	1985	1984	1983
Statutory Federal tax rate	46.0%	46.0%	46.0%
Tax exempt income	(3.1)		
Excess of tax basis over book basis of assets sold	(1.7)		
Effect of state tax expense, net of Federal tax benefit		1.9	1.8
Other	(1.2)	.1	.8
Effective tax rate	40.0%	48.0%	48.6%

NOTE 7 — CONTINGENCIES AND LITIGATION

The Company is contingently liable by reason of the Debtor's having been guarantor of the payment of interest, principal and sinking fund obligations on approximately \$17,870,000 of bonds issued by another company, which guaranty was made jointly and severally with other guarantors. The bonds, to the extent not paid by prior sinking fund installments, mature in August 1987. In its opinion approving the Plan, the Reorganization Court determined not to include any specific provision in the Plan for any contingent claim in respect of such obligations but acknowledged the right of the claimant to pursue and establish such claims as it may have under the proof of claim program of the Company relating to pre-bankruptcy unsecured obligations (which pursuant to the Plan are satisfied wholly in Capital Stock). The Reorganization Court noted that if payments continue to be made on the bonds in the ordinary course, there will be no need to pursue any remedy against the Company. The Company has been advised that all such payments have been made through December 31, 1985. The 926,362 shares issuable pursuant to the Plan as determined by the Company do not include any shares for this item.

Claims have been filed against two subsidiaries alleging disability under the Pennsylvania Occupational Disease Act. In addition, claims have been filed against one of these subsidiaries alleging disability from pneumoconiosis (black lung) under the

Federal Coal Mine Health and Safety Act in which the Debtor has also been named as a responsible party. In counsel's opinion the liability, if any, does not exceed \$650,000 for all said claims. No accruals for these claims are recorded on the Company's or subsidiaries' books.

Four suits have been brought against the Company under the Federal Employers Liability Act by former employees for asbestosis or other occupational disease allegedly caused by the Debtor's maintaining an unsafe and unhealthy workplace. In ten similar suits brought against Conrail by former employees of the Debtor, the Company, the Debtor and/or the Trustees of the Debtor have been made third-party defendants by Conrail. In addition to the foregoing, the Company has received notice of twenty-one potential claims for occupational disease by other former employees. Additionally, the Company understands from Conrail that Conrail is aware of twenty-two other suits involving hearing loss and four other suits or claims which may lead to suits involving asbestos-related disease which may become the subject of third party actions by Conrail against the Company, the Debtor and/or the Trustees of the Debtor. Also, Conrail has made the Company a third-party defendant in a suit brought by the State of New York for damages and penalties arising from an alleged environmental pollution occurrence. All of the above suits and claims were asserted subsequent to the Debtor's discharge in bankruptcy, with neither the Debtor nor the Company having notice or knowledge thereof until after the Debtor's discharge in bankruptcy. On July 8, 1985 the Reorganization Court issued an order barring all such suits and claims and Conrail and two claimants filed an appeal which is now pending in the United States Court of Appeals for the Sixth Circuit. Briefs have been filed on this appeal and in due course it will be set down for oral argument. Last October the Supreme Court of the United States, in cases involving the former Reading and Central of New Jersey Railroads, declined to review a decision of the Third Circuit Court of Appeals rendered on March 29, 1985, which was contrary to the order issued on July 8, 1985 by the Reorganization Court. The opinion of the Reorganization

Court accompanying the order of July 8, 1985 sets forth extensively that Court's reasons for reaching a decision in the case of the Company contrary to that of the Third Circuit Court of Appeals. As of the present, the Company has not completed an evaluation of its potential aggregate liability, if any, in these cases and other similar cases which might be filed, if the order of the July 8, 1985 were to be reversed. No specific accruals are recorded on the Company's books for any of these matters.

Erie Dock Company has filed claims against the Debtor for approximately \$950,000 for alleged obligations under a contract for services in connection with operating the Debtor's ore dock in Cleveland, Ohio. The Company has denied the validity of these claims in their entirety. In August, 1985, Erie Dock Company brought an action in the Special Court under the Regional Rail Reorganization Act seeking a determination that the contract was not assumed by Conrail on the basis of which, if granted, Erie Dock Company apparently intends to pursue its claim in the Reorganization Court against the Debtor.

During 1978 a suit was filed in an Ohio state court against the Debtor for \$730,000 for alleged violations of covenants to maintain and for damages to a freight house which had been leased in 1928 by the Debtor, which lease was conveyed to Conrail. In October 1982 the Ohio court held that the Debtor's liability as a tenant was limited to damages, if any, which occurred during the period May 1, 1973 to March 31, 1976; the Debtor's liability for common law waste was limited to damages, if any, which occurred during the period August 2, 1974 to March 31, 1976; and Conrail was liable for damages, if any, which occurred on or after April 1, 1976. Plaintiff has not taken any further steps to prove its damages, in any, for the applicable periods. The Company has denied the validity of the claims in this suit in their entirety.

There is pending against the Company a suit on the claim of a former affiliate of the Company for about \$406,000 against which the Company claims has a valid offset. The former affiliate takes the position that the Company does not have a valid offset. The claim, being recorded as payable, is fully reserved for on the books of the Company.

Accruals have been provided for state income taxes (approximately \$1,112,000), and for unliquidated claims (approximately \$745,000) which includes the accrual for unliquidated Class D claims referred to in note 4.

The Company is unable to determine at this time the ultimate outcome of any of the matters referred to above in this note. All amounts which may be paid in excess of recorded accruals, less Federal income tax benefit, would reduce Shareholders' Equity.

NOTE 8 — EARNINGS PER SHARE OF CAPITAL STOCK

Earnings per share of Capital Stock are based upon 926,362 shares issued and to be issued in connection with the consummation of the Plan as determined by the Company. Interest earned on Master Trust Funds would decline if substantial funds were required to be withdrawn to pay Federal income tax or other liabilities or to pay claims discussed in note 6 or 7. Accordingly, earnings per share of Capital Stock for 1985 may not be representative of the Company's future financial results and should not be used to make future projections.

SELECTED QUARTERLY FINANCIAL DATA (UNAUDITED)

(Dollars in Thousands, Except Per Share Amounts)

	First n(1)	1985		
		Second	Third	Fourth
Total Income	\$4,171	\$3,815	\$3,461	\$3,323
Net Income	1,923	2,209	2,052	1,859
Earnings per share	\$ 2.06	\$ 2.39	\$ 2.22	\$ 2.01
	First	1984		
		Second	Third	Fourth
Total Income	\$4,444	\$3,390	\$4,130	\$4,411
Net Income	2,027	1,535	2,096	2,111
Earnings per share	\$ 2.19	\$ 1.66	\$ 2.26	\$ 2.28

n(1) Net income and earnings per share for the first quarter of 1985 have been restated to revise the income tax provision. As a result, net income was reduced by \$710 thousand or \$.78 per share.

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Cleveland, Ohio 44114
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AUDITORS' REPORT

To the Shareholders and Board of Directors of Erie Lackawanna Inc.:

We have examined the consolidation balance sheets of Erie Lackawanna Inc. and subsidiaries as of December 31, 1985 and 1984 and the related consolidated statements of income and retained earnings and of changes in financial position for each of the three years in the period ended December 31, 1985. Our examinations were made in accordance with generally accepted auditing standards and, accordingly, included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

As discussed in note 6, there is uncertainty concerning the Company's Federal income tax liability, and as discussed in note 7 there are uncertainties concerning contingencies and litigation.

In our opinion, subject to the effects on the consolidated financial statements of such adjustments, if any, as might have been required had the determination of the uncertainties referred to in notes 6 and 7 been known, the accompanying consolidated financial statements present fairly the financial position of the companies as of December 31, 1984 and the results of their operations and the changes in their financial position for each of

the three years in the period ended December 31, 1985, in conformity with generally accepted accounting principles applied on a consistent basis.

/s/ DELOITTE HASKINS & SELLS
January 27, 1986

SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973

CONSOLIDATED RAIL CORPORATION,)
Plaintiff,)

and)

UNITED STATES OF AMERICA and)
UNITED STATES RAILWAY)
ASSOCIATION,)

Intervenors,)

v.)

READING COMPANY; CARL SCHOL-)
ING, on behalf of himself, and all oth-)
ers similarly situated; and WOODROW)
W. SCHWAMBACH, on behalf of him-)
self and all others similarly situated,)
Defendants.)

§1152 Panel
C.A. No. 82-29

CONSOLIDATED RAIL CORPORATION,)
UNITED STATES RAILWAY ASSOCIA-)
TION, and UNITED STATES OF AMER-)
ICA,)

Plaintiffs,)

v.)

ERIE LACKAWANNA, INC.,)
FLOYD PATRICK, et al.,)

Defendants.)

§1152 Panel
C. A. No. 84-9

FRANCIS PUISHIS, Executor of the Es-)
 tate of Anthony J. Puishis, PHILLIP)
 ANGELLO and JOHN C. HENNING,)
 Plaintiffs,)

v.)

§1152 Panel
 C. A. No. 85-2

NATIONAL RAILROAD PASSENGER)
 CORPORATION and CONSOLIDATED)
 RAIL CORPORATION,)
 Defendants.)

Before GASCH, Presiding Judge, and BRYANT and WEINER,
 Judges.

MEMORANDUM

BRYANT, Judge:

I. Introduction

These actions are brought pursuant to the Regional Rail Reorganization Act of 1973 ("Rail Act" or "3R Act"), 45 U.S.C. §701 *et seq.*, as amended by the Northeast Rail Service Act of 1981 ("NRSA"), 45 U.S.C. § 1101 *et seq.* All the cases stem from personal injury suits commenced by various longtime railroad employees, or their representatives, in federal and state courts under the Federal Employer's Liability Act ("FELA"), 45 U.S.C. §51 *et seq.*, in which damages are sought for injuries or death allegedly sustained as a result of exposure to asbestos while employed by the bankrupt railroads which transferred the bulk of their rail properties to Conrail and others pursuant to section 303(b) of the Rail Act.

In each of the cases in this court plaintiffs seek a declaratory judgment, pursuant to 28 U.S.C. §2201, on the same issue, i.e., the effect of the Rail Act upon the aforementioned FELA claims. More specifically, the issue is whether §709(b) of the Act furnishes grounds for recovery of damages against Conrail and/or

Amtrak, or instead, erects a permanent barrier against recovery from them, either under the Act or any other authority.

The cases were previously consolidated for the purpose of hearing motions and are now before the court on cross-motions for summary judgment. The procedural backgrounds of the cases differ, and it is helpful to examine the routes which have brought them to their current common ground.

II. PROCEDURAL BACKGROUND

A. Conrail, et al. v. Reading Co., et al., C.A. No. 82-29

This action was brought by Conrail in December 1982 against the Reading Co. ("Reading") and two former Reading employees. Reading, whose rail properties were conveyed to Conrail in 1976, was discharged in bankruptcy in 1980. Both individual defendants, Woodrow W. Schwambach, who was subsequently employed by Conrail, and Carl Scholing, who was not hired by Conrail, are among several who have filed FELA actions against Conrail and Reading in the United States District Court for the Eastern District of Pennsylvania, for asbestos-related injuries allegedly sustained while they were employed by Reading. On April 13, 1984 this court granted the motions of the United States and the United States Railway Association ("USRA") for leave to intervene as plaintiffs. All parties have moved for summary judgment.

B. Conrail, et al. v. Erie Lackawanna, Inc., et al., C.A. No. 84-9

In October 1984 Conrail commenced this suit against Erie Lackawanna ("Erie") and nine former railroad employees. The individual defendants had worked for either Erie, Lehigh Valley Railroad Co. ("Lehigh Valley") or Penn Central Transportation Co., ("Penn Central") prior to being employed by Conrail. Erie, Lehigh Valley and Penn Central conveyed their rail properties to Conrail in 1976 and their reorganization plans have since been consummated. Thereafter, the nine individual defendants in this case filed FELA suits against Conrail in New Jersey state courts

in which they assert that Conrail is liable, as a successor corporation to the bankrupt railroads, for injuries that stemmed from their employment with Conrail's predecessors. On November 28, 1984 this court granted the United States and the USRA leave to intervene as plaintiffs. The parties have moved for summary judgment.

C. Puishis, et al. v. Amtrak and Conrail, C.A. No. 85-2

Three individuals brought this action in January 1985 against Conrail and Amtrak. One plaintiff had worked for Penn Central and seeks relief from Conrail; another had worked for Erie and Conrail and is seeking relief against Conrail; a third plaintiff and worked for Penn Central and seeks relief from Amtrak. Plaintiffs here seek a declaratory judgment that, pursuant to provisions of the Rail Act, Conrail and Amtrak are obligated to assume, process, and pay the claims for asbestos-related injuries arising from plaintiffs' employment with Conrail's and Amtrak's predecessors. On June 13, 1985 this court granted Erie's motion to intervene as a defendant. All parties have now moved for summary judgment.

On March 18, 1985 this court entered an order which stayed trial of the FELA actions pending in other courts.

III. Liability Under Section 709(b) of the Rail Act

All three cases turn on the current applicability and the effect of § 709(b) of the Rail Act, as amended, 45 U.S.C. § 797h(b), and § 211(h)(1) of the Act, 45 U.S.C. § 721(h)(1).¹

Section 709(b) states:

1. Section 709(b) is virtually identical to former § 504(g) (45 U.S.C. § 774(g) (repealed 1981)). Section 709(b) was enacted in 1981 by the Northeast Rail Service Act of 1981, § 1143(a), Act of August 13, 1981, Pub. L. 97-35, Title XI, Subtitle E, Part 3, 95 Stat. 666, simultaneously with the repeal (NRSA § 1144(a)(1)) of § 504(g), which had first been enacted as § 618 of the Rail Revitalization and Regulatory Reform Act of 1976 ("4R Act"), Act of February 5, 1976, Pub. L. 94-210, Title VI, § 615, 90 Stat. 113.

ASSUMPTION OF PERSONAL INJURY CLAIMS.

— All cases or claims by employees or their personal representatives for personal injuries or death against a railroad in reorganization in the Region arising prior to the date of conveyance of rail properties, pursuant to section 303 of this Act, [45 U.S.C. § 743] shall be assumed by the Corporation or an acquiring railroad, as the case may be. The Corporation or the acquiring railroad shall process and pay any such claims that are sustained or settled, and shall be entitled to direct reimbursement from the Association pursuant to section 211(h) of this Act [45 U.S.C. § 721(h)], to the extent that such claims are determined by the Association or its successor authority to be the obligation of such railroad. Any liability of an estate of a railroad in reorganization which is assumed, processed, and paid, pursuant to this subsection, by the Corporation or an acquiring railroad shall remain the preconveyance obligation of the estate of such railroad for purposes of section 211(h)(1) [45 U.S.C. § 721(h)(1)], of this Act. The Corporation, an acquiring railroad, or the Association, as the case may be, shall be entitled to a direct claim as a current expense of administration, in accordance with the provisions of section 211(h) of this Act [45 U.S.C. § 721] (other than paragraph (4)(A) thereof), for reimbursement (including costs and expenses of processing such claims) from the estate of the railroad in reorganization on which behalf such obligations were discharged or paid.

In brief, Conrail, Amtrak, the United States and the USRA assert that both the language and the legislative history of § 709(b) preclude liability under that section for the tort claims brought by the individual defendants in C.A. Nos. 82-29 and 84-9 and the plaintiffs in C.A. No. 85-2 ("the employee claimants"). Alternatively, Conrail contends that if this court determines that it is liable under § 709(b) the court should also hold that it is entitled to automatic reimbursement for any claims sustained against it, pursuant to § 709(b) and § 211(h)(1) of the Rail Act, 45 U.S.C. §§ 709(b) and 721(h)(1). Section 211(h)(1) of the

Act states that the USRA shall provide loans to Conrail and acquiring railroads to compensate for, inter alia, payments made pursuant to § 709(b). The United States and the USRA, however, part company with Conrail and Amtrak on the question of reimbursement, maintaining that the loan payment and reimbursement provisions of § 211(h) were intended only as short-term measures, expedients whose time has passed. The employee claimants argue that Conrail and Amtrak are liable under § 709(b), whether or not Conrail and Amtrak are entitled to reimbursement under § 211(h). Reading and Erie urge that regardless of whether Conrail and Amtrak are liable to the employee claimants under § 709(b), that inasmuch as the railroads have been discharged in bankruptcy, Conrail, Amtrak, and the USRA cannot seek subsequent reimbursement from them.

* * *

Conrail and Amtrak specifically assert that § 709(b) is facially inapplicable to the underlying tort claims of the employee claimants. We agree.

Section 709(b), by its own terms, establishes two threshold requirements for its application. The first sentence of § 709(b) expressly provides that Conrail, or an acquiring railroad shall assume only those "cases or claims . . . against a railroad in reorganization . . . arising prior to the date of conveyance of rail properties. . . ."

The Rail Act defines a "railroad in reorganization" as:

a railroad which is subject to a bankruptcy proceeding and which has not been determined by a court to be reorganizable or not subject to reorganization pursuant to this chapter as prescribed in section 207(b) of this Act [45 U.S.C. § 717(b)]. A "bankruptcy proceedings" includes a proceeding pursuant to section 77 of the Bankruptcy Act (11 U.S.C. § 205) and an equity receivership or equivalent proceeding.

Section 102(16) of the Rail Act, 45 U.S.C. § 702(16).

The predecessor railroads of Conrail and Amtrak that employed the employee claimants have undergone reorganization, final consummation orders have been entered, and each railroad

has been discharged in bankruptcy.² Hence, none of the railroads in question are any longer "subject to a bankruptcy proceeding", nor were any of them subject to such proceedings at the time the underlying tort claims were first asserted.

No party has suggested any authority to support a contrary interpretation of "a railroad in reorganization". Nor does any party dispute the fact that the railroads involved in this litigation are no longer subject to bankruptcy proceedings.

Where, as is the case here, the definition of a statutory term is clear and unequivocal it is controlling. *Metropolitan Life Insurance Co. v. Travelers' Life Insurance Co.*, 105 S. Ct. 2380, 2389 (1985); N. Singer, 1 *Sutherland Stat. Const.* § 27.02 (Sands 4th ed. 185). See *id.* § 47.07³ furthermore, this view of § 709(b) as having only limited applicability, in general, and no application under the circumstances of these cases, is supported by a review of the reimbursement provisions of that section. Section 709(b) specifies that any damages paid out by Conrail are subject to reimbursement "from the estate of the railroad in reorganization." Obviously, this scheme contemplates the existence of such "estates". Where, as is the case here, the railroads have been discharged in bankruptcy and no such "estates" remain, the scheme envisioned by Congress cannot be effectuated.

This express requirement of § 709(b) is dispositive of the question of whether the subject personal injury claims can be brought against Conrail and Amtrak under that section, and inasmuch as it appears that none of the railroads in these cases fit within § 102(16)'s definition, we conclude that Conrail and Amtrak cannot be held liable under that section for such claims. Thus, we need not determine whether these claims or cases "[arose] prior to the date of conveyance of rail properties . . .", or consider whether the United States and the USRA have any

2. The consummation dates for the various bankrupt railroads were: Erie — November 30, 1982; Reading — December 31, 1980; Penn Central — October 24, 1978; Lehigh Valley — September 1, 1982; Central of New Jersey — September 14, 1979.

3. See also *Park 'n Fly, Inc. v. Dollar Park and Fly, Inc.*, 105 S. Ct. 658, 662 (1985); *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 110 (1983).

duty to reimburse Conrail and Amtrak. By the same token, § 709(b) has no effect on the determination of any obligations of the former rail entities in these cases.

IV. PREEMPTION

Conrail, having convinced the court that § 709(b) is no weapon for the individual plaintiffs in their fight for damages, would now have us declare it an impenetrable shield against any claims of liability. We are urged to recognize § 709(b), in the context of the whole Act, as a preemptive strike against any attempt to pin liability on Conrail under any theory of tort law. Specifically, the claim is that § 709(b) insulates Conrail from common law successor tort liability, thereby barring employees of the bankrupt railroads from pressing FELA claims against it.

A. Jurisdiction to Determine Preemptive Effect

Reading and Erie contend that this court lacks jurisdiction to determine the question of § 709(b)'s preemptive effect. The plaintiffs in C.A. No. 85-2, while not contesting the court's jurisdiction, suggest that any decision by the court on the question of Conrail's common law successor liability would be premature.

This court's jurisdiction is established by § 1152(a) of NRSA, which provides, in pertinent part:

Notwithstanding any other provision of law, the special court shall have original and exclusive jurisdiction over any civil action —

(1) for injunctive, declaratory, or other relief relating to the enforcement, operation, execution, or interpretation of any provision of or amendment made by this subtitle, or administrative action taken thereunder to the extent such action is subject to judicial review.

45 U.S.C. § 1105(a).

Conrail seeks a declaration from this court that § 709(b) preempts common law tort principles as they might apply to these

cases. Conrail argues that the question of § 709(b)'s residual preemptive effect, if any, is a matter suitable for "declaratory . . . relief", as it is one that "relat[es] to the enforcement . . . or interpretation" of a NRSA provision.

An interpretation of the preemptive effect of § 709(b), or any other section added to the Rail Act by NRSA, falls within the literal purview of jurisdiction conferred on this court by § 1152(a)(1). In the context of these cases, the determination of that question is one "which has the potential for significantly effecting implementation of [NRSA]". *Consolidated Rail Corporation v. County of Monroe*, 558 F. Supp. 1387, 1390 (Sp. Ct. R.R.R.A. 1983). Conrail and Amtrak urge the court to go farther and assume jurisdiction to determine whether the overall federal regulatory scheme embodied in the Rail Act precludes any imposition of successor liability. This court's jurisdiction over provisions of the Rail Act, other than those provisions added or amended by NRSA, is found in § 209(e) of the Rail Act. The § 209(e) jurisdiction is more circumscribed than the jurisdiction found in § 1152(a) of NRSA. As we have held, § 209(e)(1) does not confer jurisdiction over every suit requiring an interpretation of the Rail Act. There must be a challenge to an action or inaction of USRA or to a provision of the Rail Act itself. *Prairie Central Ry v. Illinois Central Gulf RR*, 564 F. Supp. 385 (Sp. Ct. R.R.R.A. 1983). The other provisions of § 209(e) are inapplicable to these cases.⁴ Conrail and Amtrak are not challenging the Rail

4. Section 209(e) states, in pertinent part:

(e) ORIGINAL AND EXCLUSIVE JURISDICTION. — (1) Notwithstanding any other provision of law, any civil action—

(A) for injunctive or other relief against the Association from the enforcement, operation, or execution of this Act or any provision thereof, or from any action taken by the Association pursuant to authority conferred or purportedly conferred under this Act;

(B) challenging the constitutionality of this Act or any provision thereof;

(C) challenging the legality of any action of the Association, or any failure of the Association to take any action, pursuant to authority conferred or purportedly conferred under this Act;

(D) to obtain, inspect, copy, or review any document in the possession or control of the Association that would be discoverable in

Act but seeking a declaration that the overall purpose of the Act, to establish an economically viable freight railroad in the region, is jeopardized by the possibility of imposing common law successor liability on Conrail. This may be so, but it is not within our exclusive jurisdiction to determine. We must limit our decision to those questions which fit squarely within our § 1152(a)(1) jurisdiction, that is, the preemptive effect of § 709(b) or other provisions of NRSA.

litigation pursuant to section 303(c) of this Act;

(E) brought after a conveyance, pursuant to section 303(b) of this Act, to set aside or annul such conveyance or to secure in any way the reconveyance of any rail properties so conveyed; or

(F) with respect to continuing reorganization and supplemental transactions, in accordance with section 305 of this Act;

shall be within the original and exclusive jurisdiction of the special court. The special court shall not hear or determine any such action prior to the date of conveyance, pursuant to section 303(b)(1) of this Act, except as the Constitution may require. Relief shall not be granted in any action referred to in subparagraph (A) (C), or (E) unless the person seeking such relief establishes that the Association acted in reckless or deliberate disregard of applicable law.

(2) The original and exclusive jurisdiction of the special court shall include any action, whether filed by any interested person or initiated by the special court itself, to interpret, alter, amend, modify or implement any of the orders entered by such court pursuant to section 303(b) of this Act in order to effect the purposes of this Act or the goals of the final system plan. During the pendency of any proceeding described in this paragraph, the special court may enter such orders as it determines to be appropriate, including orders enjoining, restraining, conditioning, or limiting any conveyance, transfer, or use of any asset or right which is subject to such an order or which is at issue in such a proceeding, or which involves the enforcement of any liens or encumbrances upon such assets or rights. Any orders pursuant to this paragraph which interpret, alter, amend, modify, or implement orders entered by the special court shall be final and shall not be restrained or enjoined by any court.

B. Basic Principles

The principle is well-established that the Supremacy Clause, U.S. Const., Art. VI, cl. 2⁵ invalidates state laws⁶ that “interfere with, or are contrary to, federal law.” *Hillsborough County v. Automated Medical Laboratories, Inc.*, 105 S. Ct. 2371, 2375 (1985) (quoting *Gibbons v. Ogden*, 22 U.S. [9 Wheat.] 1, 211 (1924)).⁷

Federal legislation may preempt state law in three ways.

First, in enacting the federal law, Congress may explicitly define the extent to which it intends to preempt state law. E.g. *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983). Second, even in the absence of express preemptive language, Congress may indicate an intent to occupy an entire field of regulation, in which case the States must leave all regulatory activity in that area to the Federal Government. E.g., *Fidelity Federal Savings & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Finally, if Congress has not displaced state regulation entirely, it may nonetheless preempt state law to the extent that the state law actually conflicts with federal law. Such a conflict arises when compliance with both state and federal law is impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 32, 142-143 (1963), or when

5. The Supremacy Clause provides that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . are the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

6. Congressional authority to preempt the power of the states applies equally to statutes and the common law. See *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981); *Sperry v. Florida*, 373 U.S. 379, 403 (1963).

7. See *Pacific Gas & Electric Co. v. State Energy Resources and Conservation Development Comm’n*, 461 U.S. 190, 203-04 (1983); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157-58 (1978). See also *Louisiana Public Service Commission v. Federal Communications Commission*, 106 S. Ct. 1890, 1898 (1986); *Exxon Corp. v. Hunt*, 106 S. Ct. 1103, 1109 (1986).

the state law “stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress.” *Hines v. Davidowitz*, 312 U.S. 2, 67 (1961).

Michigan Canners and Freezers Ass’n, Inc. v. Agricultural Marketing and Bargaining Board, 467 U.S. 461, 469 (1984).⁸

While “[n]o simple formula can capture the complexities” of preemption doctrine, *Goldstein v. California*, 412 U.S. 546, 561 (1973),⁹ a few general principles are articulable. First, the intent of Congress in enacting the federal statute is the “ultimate touchstone” for determining the statute’s preemptive scope. *Retail Clerks v. Schemerhorn*, 375 U.S. 96, 103 (1963).¹⁰ Therefore, our primary task is to “ascertain Congress’ intent”, *Metropolitan Life Insurance Co. v. Massachusetts*, 105 S. Ct. 2380, 2388 (1985) (quoting *Shaw*, 463 U.S. at 95).

Second, there is a general presumption against preemption. *Metropolitan Life*, 105 S. Ct. at 2390.¹¹ The “exercise of federal supremacy is not lightly to be presumed,” *Schwartz v. Texas*, 344 U.S. 199, 203 (1952) and will not be found in “the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.” *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981).¹²

Considerations of federalism also dictate that where we are uncertain about Congress’ intent we should hesitate to find preemption. *Penn Dairies v. Milk Control Comm’n*, 318 U.S. 261,

8. See *Pacific Gas & Electric Co. v. State Energy Resources and Conservation Development Comm’n*, 461 U.S. 190, 203-04 (1983); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157-58 (1978). See also *Louisiana Public Service Commission v. Federal Communications Commission*, 106 S. Ct. 1890, 1898 (1986); *Exxon Corp. v. Hunt*, 106 S. Ct. 1103, 1109 (1986).

9. See *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638 (1973).

10. See *Metropolitan Life Insurance Co. v. Massachusetts*, 105 S. Ct. 2380, 2393 (1985); *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978).

11. See *id.*, 105 S. Ct. at 2393; *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405, 413 (1973).

12. See *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977); *Rice v. Santa Fe*, 331 U.S. at 230; *Hines v. Davidowitz*, 312 U.S. at 61-62.

275 (1943). Thus, the presumption against preemption “provides assurance that ‘the federal-state balance’ will not be disturbed unintentionally by Congress or unnecessarily by the courts.” *Jones v. Rath*, 430 U.S. at 525 (citation omitted).

Another reason for such caution is that Congress has the undoubted ability to “act so unequivocally as to make it clear it intends no regulation but its own.” *Rice v. Santa Fe*, 331 U.S. at 236. Given the “basic assumption that Congress did not intend to displace state law,” *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981),¹³ we are admonished to construe the statute in question so as to avoid preemption. *Metropolitan Life*, 105 S. Ct. at 2390.

The third basic principle is that state laws of general applicability are less subject to preemption than are state laws specifically designed to regulate particular types of nongovernmental activities. *New York Telephone Co. v. New York States Dept. of Labor*, 440 U.S. 519, 533 (1970) (plurality opinion). Although there is no guarantee that state laws of general applicability are exempt from preemption, *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 193 and n.22 (1978); *Farmer v. Carpenters*, 430 U.S. 290, 300 (1977), deference is commonly accorded general state laws of a particular type — those “that protect interests ‘deeply rooted in local feeling and responsibility.’” With respect to such laws, [the Supreme Court has] stated ‘that in the absence of compelling congressional direction, we [can] not infer that Congress ha[s] deprived the states of the power to act.’” *New York Telephone*, 440 U.S. at 540 (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959)).¹⁴

The fourth fundamental principle follows directly from the third:

[w]here . . . the field that Congress is said to have pre-empted has traditionally been occupied by the States “ ‘we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act

13. See *Rice v. Santa Fe*, 321 U.S. at 230.

14. See *id.* at 535; *Belknap, Inc. v. Hale*, 463 U.S. 491, 497-98, 509-10 (1983); *Sears*, 436 U.S. at 198, n.22; *Farmer*, 430 U.S. at 296-97.

unless that was the clear and manifest purpose of Congress.' ”

Hillsborough County, 105 S. Ct. at 2376 (quoting *Jones v. Rath*, 430 U.S. at 525; quoting *Rice v. Santa Fe*, 331 U.S. at 2301)).¹⁵

Furthermore, this specific presumption against preempting a state's exercise of its traditional police powers is especially strong regarding laws that protect the health and safety of a state's citizens; such laws are “those ‘the Court has been most reluctant to invalidate.’ ” *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981) (plurality opinion) (quoting *Raymond Motor Transportation, Inc. v. Rich*, 434 U.S. 429, 443 (1978)). See *Hillsborough County*, 105 S. Ct. at 2376; *Metropolitan Life*, 105 S. Ct. at 2398; *Silkwood v. Kerr-McGee, Corp.*, 464 U.S. 238, 250-51, 255 (1984); *United Construction Workers v. Laburnum Corp.*, 347 U.S. 656, 665 (1954).¹⁶

Fifth and finally, the burden of demonstrating preemption is on the party who seeks its adoption. *Silkwood*, 464 U.S. at 255. Under ordinary circumstances that burden is a formidable one. See *Motor and Equipment Manufacturers' Ass'n v. Environmental Protection Agency*, 627 F.2d 1095, 1107 n.20, cert. denied sub. nom. *General Motors Corp. v. Costle*, 446 U.S. 952 (1980). See also *Florida Lime*, 373 U.S. at 146-47.

These principles, particularly the strong presumption against preemption, are serious obstacles to the success of Conrail's and Amtrak's argument.

15. See *Metropolitan Life*, 105 S. Ct. at 2389; *Pacific Gas & Electric*, 461 U.S. at 306; *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981); *id.*, at 681 n.1 (Brennan, J., concurring in judgment); *id.*, at 691 (Rehnquist, J., dissenting); *Ray v. Atlantic Richfield*, 435 U.S. at 158.

16. See also Note, “A Framework for Preemption Analysis”, 88 *Yale L.J.*, 363, 374 (1978) (“Traditional protection of vital interests . . . is the category that is most impervious to preemption. If state laws protect people mostly inside the state from physical injury, they have been upheld even if they substantially hinder conduct that appears to be necessary to achieve a central purpose of national law.”); *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1542 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 545 (1984) (“The provision of tort remedies to compensate for personal injuries ‘is a subject matter of the kind [the] Court has traditionally regarded as properly within the scope of state superintendence.’ ” (quoting *Florida Lime*, 373 U.S. at 144)).

* * *

Conrail asserts that there are two basic reasons why this court should hold that common law principles of successor liability are preempted. The first is that in enacting § 711 of NRSA, 45 U.S.C. § 797j, Congress expressly precluded the application of such common law principles. The second reason is that § 709(b), when considered within the context of the structure and purpose of the Rail Act as a whole, reflects Congress' implied intent to preclude such application.

C. Express Preemption

Conrail's express preemption argument turns on its interpretation of § 711 of NRSA, which states:

No State may adopt or continue in force any law, rule, regulation, order, or standard requiring [Conrail or Amtrak] to employ any specified number of persons to perform any particular task, function, or operation, or requiring [Conrail] to pay protective benefits to employees, and no State in the Region may adopt or continue in force any such law, rule, regulation, order, or standard with respect to any railroad in the Region.

45 U.S.C. § 797j.

Conrail contends that since both § 711 and § 709(b) are contained in Title VII of the Rail Act and since the heading of that title reads "Protection of Employees", the right to sue for redress of personal injuries embodied in § 709(b) must be construed as a "protective benefit", a benefit that states may not confer or enforce. Conrail's Supp. Mem. at 43 (Nov. 3, 1985).¹⁷

In interpreting the Rail Act "we have no choice but to begin with the language employed by Congress and the assumption

17. "[S]ince § 709(b) is a part of a Title which generally addresses the protection of employees", "Congress must have intended not only to preempt state law which requires Conrail to employ a specific number of people to perform specific tasks, but also to preempt all state laws which would require Conrail to pay protective benefits to employees", such as those incorporated in section 709(b). *Id.*

that the ordinary meaning of that language expresses the legislative purpose.' " *Metropolitan Life*, 105 S. Ct. at 2389 (quoting *Park 'n Fly*, 105 S. Ct. at 662). The ordinary meaning of "protective benefits" can hardly be said to include the right to sue in tort for personal injuries. Moreover, Conrail has not identified, nor have we found, any language in the Rail Act or any discussion in its legislative history that shows that Congress comprehended or intended such an expanded notion of that phrase.

Nor are we persuaded by the fact that § 709(b) is within a title entitled "Protection of Employees". Propinquity does not warrant preemption. "Titles do not control meaning; preambles do not change language." K. Llewellyn, *The Common Law Tradition: Deciding Appeals*—Appendix C, "Canons on Statutes" 524 (1960); see N. Singer, 3 *Sutherland Stat. Const.* § § 47.03, 47.14 (Sands 4th ed. 1984).

Obviously employees can be protected by both benefits and rights, without rights meaning the same thing as, or being subsumed under, benefits. In this context, benefits are a matter of entitlement, available to all members of a class, such as "[f]inancial assistance received in time of sickness, disability, unemployment, etc. either from insurance or public programs such as social security." *Black's Law Dictionary* 143 (rev. 5th ed. 1979). By contrast, a right of action "pertains to remedy or relief through judicial procedure, . . . the legal right to maintain an action growing out of a given transaction or state of facts and based thereon." *Id.* at 1190. See also "cause of action", *id.* at 201.

That Congress well understood this distinction between benefits and rights of action is demonstrated by other sections of Title VII, sections which far more comfortably fit within the rubric of "protective benefits to employees". For example, § 701(b), 45 U.S.C. § 797(b), states that government funds may be provided for, *inter alia*:

- (1) Allowances to employees deprived of employment.
- (2) Moving expenses for employees who must make a change in residence.
- (3) Retraining expenses for employees who are seeking employment in new areas.

- (4) Termination allowances for employees.
- (5) Health and welfare insurance premiums.¹⁸

The legislative history cited by Conrail not only does not support its contention that the right to pursue a cause of action for personal injury is merely another employee "benefit", but actually undermines it. To be sure, as Conrail has noted, the Senate Report on the Northeast Rail Service Act of 1981, which added § § 709 and 711 to the Rail Act, criticized the employee protective benefits provided by the "3-R Act . . . as the most expensive labor protection provision in labor history." S. Rep. No. 101, 97th Cong., 1st Sess., 10 (May 15, 1981). But the Senate Report's discussion of that program identifies these financially burdensome benefits as "monthly dismissal allowance[s]", "monthly allowances" for "[d]isplaced employees", and "separation allowances[s]." *Id.* The Senate Report simply makes no mention of causes of action brought under FELA as a "benefit". Nor is there any other evidence that § 711's use of "protective benefits" was intended to include such causes of action.

Most importantly, other provisions of the Rail Act illustrate that Congress knew how to bar the application of state or federal law, and when it so chose used language that left no room for ambiguity or uncertainty.¹⁹

In light of the foregoing we must reject Conrail's argument that § 711 expressly preempts common law successor liability.

18. *Cf.* § 702 of the Rail Act, 45 U.S.C. § 797a—"Termination Allowance"; § 703, 45 U.S.C. § 797b—"Preferential Hiring"; and § 704, 45 U.S.C. § 797c—"Central Register of Railroad Employment."

19. *See, e.g.* § 601(a)(2) of the Rail Act, 45 U.S.C. § 791(a)(2) ("The antitrust laws are inapplicable . . ."); § 601(b)(1) of the Rail Act, 45 U.S.C. § 791(b)(1) ("The provisions of the Interstate Commerce Act . . . and the Bankruptcy Act . . . are inapplicable . . ."); § 601(c) of the Rail Act, 45 U.S.C. § 791(c) (The environmental regulations of "section 4332(2)(C) of Title 42 shall not apply . . ."); NRSA § 1153(a)(1), 45 U.S.C. § 1106(a)(1) ("All transfers or conveyances of any interest in rail property . . . shall be exempt from any taxes . . . imposed by the United States or by any State . . ."). *See also*, Note, "A Framework for Preemption Analysis", 88 *Yale L. J.*, 363, 364-65 and nn.4-5 (1978).

D. Implied Preemption

Conrail raises three arguments in favor of implied preemption of common law successor liability. First, federal rail legislation is so "pervasive" that it demonstrates that Congress occupied the field to the exclusion of any concurrent state regulation. Second, the federal interest in establishing an economically viable Conrail is so "dominant" that it precludes the application of state tort law. Third, state tort law would "frustrate" the Congress' goal of creating an economically viable Conrail. We consider each in turn.

1. "Pervasive Federal Regulation"

Conrail contends that "[t]hrough the Rail Act, the 4-R Act, RTIA, the Staggers Act, and NRSA" Congress created a legislative scheme that is so "extraordinarily comprehensive" that it is difficult to infer that "Congress left any room for state actions to supplement . . . the far-ranging federal scheme." Conrail's Supp. Mem. at 48-49. Since "Congress intended to occupy the field of reorganization of our bankrupt railroads . . . [c]ommon law successor liability has no place" *Id.* at 50.

The chief obstacle to Conrail's argument is the Supreme Court's repeated statements that the pervasive nature of federal regulation, standing alone, cannot be used to prove a congressional intent to occupy an entire field and is therefore insufficient to preempt all state law that concerns the subject matter of the federal scheme. *Hillsborough County*, 105 S. Ct. at 2377; *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405, 415 (1973).²⁰

We also note that although the scheme of federal regulation embodied in the Rail Act and its companion legislation is undoubtedly comprehensive, this scheme can hardly be said to be more pervasive than the "comprehensive amalgam of [federal] substantive law and regulatory arrangements" that concerns labor-management relations, *Local 926, International Union of*

20. See *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 491 (9th Cir. 1984), cert. denie, sub nom. *Chevron U.S.A., Inc. v. Sheffield*, 105 S. Ct. 2686 (1985); *Motor and Equipment Manufacturers*, 627 F.2d 1107 n.20.

Operating Engineers v. Jones, 460 U.S. 669, 675 (1983), or the detailed and interwoven federal legislation that concerns nuclear power. Yet in both these areas the Court has consistently refused to infer that all related state laws are preempted. *Allis-Chalmers Corp. v. Lueck*, 105 S. Ct. 1904, 1910 (1985) (labor law); *Brown v. Hotel and Restaurant Employees*, 468 U.S. 491 (1984) (labor law); *Pacific Gas & Electric*, *supra* (nuclear power); *Silkwood*, *supra* (nuclear power).²¹

We do not question that the Rail Act and subsequent legislation did create a comprehensive federal scheme designed to revitalize freight railroads in the region. Whether that scheme evidences an intent to preclude imposition of successor liability on Conrail is not for this court to determine. We must look to § 709(b) and NRSA.

The legislative history of § 709(b) and its companion provision, § 211(h)(1)(A), 45 U.S.C. § 721(h)(1)(A),²² demonstrates that they were designed to function solely as a temporary stop-gap or housekeeping device, as an administrative and procedural mechanism intended to ensure that employee personal injury claims would be expeditiously handled during the transformation of the bankrupt railroads into Conrail, and not as a substantive provision creating, defining, or limiting rights and remedies. Conrail concedes as much. "[W]hile Conrail was required initially to meet certain obligations of the railroads in reorganization . . . it was to do so simply as a device for preserving continuity during the period of conveyance" Conrail's Supp. Mem. at 31. Congress evidently hoped that by

21. See *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 289 (1971) (labor law); *Garner v. Teamsters*, 346 U.S. 485 (1953) (labor law).

22. Section 211(h)(1)(A) reads, in pertinent part:

The [United States Rail] Association is authorized . . . to enter into loan agreements . . . with [Conrail] . . . under which [Conrail] . . . will agree to meet existing or prospective obligations of the railroads in reorganization in the region . . . in order to avoid disruptions in ordinary business relationships. Such obligations shall be limited to —

(v) claims of all employees or their personal representatives for personal injuries or death and subject to the provisions of [Federal] Employers' Liability Act (45 U.S.C. § 51-60).

providing for the prompt and full compensation of employee personal injury claims employee anger and disaffection would be minimized, which, in turn, would reduce the potential for disruption of Conrail's operations during the crucial period of its inauguration as a railroad.

The purpose of [§ 211(h)] was to provide a mechanism for effecting a smooth transition from the rail operations of the bankrupt railroads to ConRail and other profitable carriers in accordance with the final system plan. The loans were designed to preclude disruptions in rail operations due to the inability of the bankrupt estates to currently meet their obligations to employees, shippers, other railroads, and suppliers for materials and services rendered immediately prior to conveyance on April 1, 1976. It was clear that the claimants would probably react against ConRail and the other acquiring carriers if their unpaid claims were not timely paid because they were left with the estates to be individually collected through the reorganization courts.

Report of the [House] Comm. on Interstate and Foreign Commerce on the Rail Amendments of 1976, H.R. Rep. No. 94-1479, 94th Cong., 2d Sess. at 14 (Sept. 8, 1976).²³

By contrast, the overwhelming majority of the provisions enacted by the Rail Act and its companion legislation focused on the creation of Conrail as a functioning railroad. Aside from the stop-gap mechanism of § 709(b), Congress simply did not address the issue of how the former employees of the bankrupt railroads were to seek redress for injuries sustained prior to the creation of Conrail. In sum, what Conrail characterizes as "pervasive federal regulation" is insufficiently comprehensive to support an inference that Congress intended all state tort law to be preempted.

23. See *id.* at 15-16. See also Report of the Comm. of the Conference on the Railroad Revitalization and Regulatory Reform Act of 1976, H.R. Rep. No. 94-781, 94th Cong., 2d Sess. at 140, 192-93 (Feb. 13, 1976); Joint Explanatory Statement of the Comm. of the Conference, H.R. Rep. No. 94-1743, 94th Cong., 2d Sess. at 31-35, 41 (Sept. 30, 1976) reprinted in [1976] U.S. Code Cong. & Ad. News 5854-58, 5864.

2. "Dominant Federal Interest"

"Preemption of a whole field . . . will be inferred where the field is one in which 'the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.' " *Hillsborough County*, 105 S. Ct. at 2375 (quoting *Rice v. Santa Fe*, 331 U.S. at 230); See *Hines*, 312 U.S. at 52.

Conrail contends that the federal interest in establishing Conrail as an economically viable railroad is so dominant as to require the preclusion of "state-law principles of successor liability." Conrail's Supp. Mem. at 52.

We are unpersuaded by this argument.

Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law. Neither does the Supremacy Clause require us to rank congressional enactments in order of "importance" and hold that, for those at the top of the scale, federal regulation must be exclusive.

Hillsborough County, 105 S. Ct. at 2378.

Consequently, the mere existence of a federal interest, however strong or important it may seem at first glance, cannot justify preemption. Rather we are admonished to look for "special features warranting preemption." *Id.*

The Supreme Court has provided clear standards in this area. For example, the regulation of foreign affairs is a paradigmatic "dominant interest", one "intimately blended and intertwined with the responsibilities of national government." *Hines v. Davidowitz*, 312 U.S. at 66. See *Zschernig v. Miller*, 389 U.S. 429 (1968); *Pennsylvania v. Nelson*, 350 U.S. 497 (1956). State tort law is not the sort of regulation that encroaches on subjects that are essentially national in character, or subjects that are reserved by the Constitution as solely the province of the federal government. To the contrary, as the *Hillsborough County* Court observed in rejecting a preemption claim based on an asserted dominant federal interest, "the regulation of health and safety

matters is primarily, and historically, a matter of local concern." 105 S. Ct. at 2378.

3. "Inconsistency with Federal Objectives"

Conrail's final argument is that allowing a state to apply common law successor liability principles "would permit[] an unpredictable but large influx of liability claims," which "would drain Conrail financially and thereby interfere with the congressionally [sic] objectives" of creating an economically viable rail system. Conrail's Supp. Mem. at 53, 54. Thus, "the state common law of successor liability 'stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.'" *Id.* at 53 (quoting *Hines*, 312 U.S. at 67).

There is no doubt that Congress intended to create a viable rail system. Section 101(b)(2) of the Rail Act, 45 U.S.C. § 701(b)(2). Nor is there any question that Congress sought to insulate Conrail from certain liabilities, and also in enacting NRSA sought to reduce the expense of employee benefit programs. Section 1144(a)(1) of NRSA repealed the employee protection provisions of Title V of the Rail Act and § 1143(a) substituted a new Title VII which was substantially less generous to employees. For example, § 702 enabled Conrail to reduce the number of employees substantially and provided a substantially lower level of labor protection benefits to the terminated employees. See *United Transp. Union v. Consolidated Rail Corp.*, 535 F. Supp. 697 (Sp. Ct. R.R.R.A. 1982). However, these provisions do more than demonstrate Congress' intent to limit sources of financial burden. The fact that Congress listed and expressly limited some burdens suggests that this court should be wary of expanding that list simply on the basis of Congress' silence.

The principal problem with Conrail's argument is that there is just no indication that Congress regarded the possibility of successor tort liability to be an obstacle to Conrail's continued operations, unlike Congress' explicit finding that the crippling burden of employee protective benefits posed an obstacle to the purposes of the Rail Act, see NRSA § 1132(4), 45 U.S.C.

§ 1101(4). In sum, we are asked to find preemption on the basis of Conrail's speculation about the danger of an "unpredictable but large influx of liability claims," Conrail's Supp. Mem. at 53, a conjecture that Conrail has not supported by any facts, and a danger that Congress never saw fit to mention.

Conrail's argument sweeps too broadly, as it presupposes that every difference in purpose between federal and state law is tantamount to a conflict in purpose. This argument would require the preemption of every state law that did not precisely conform to the relevant federal laws. Given the varied, multiple, and oftentimes ambiguous purposes of congressional enactments, few state laws could withstand a preemption challenge.

Our proper concern is not whether the federal and state laws have different purposes or whether they are potentially in conflict, but whether the exercise of concurrent federal and state jurisdiction in a related area presents an "irreconcilable" and "inevitable" conflict. *Florida Lime*, 373 U.S. 142-43.

Accommodation between federal and state laws, not preemption by the former over the latter, is the preferred solution.

In situations where federal and local enactments overlap in their effect on non-governmental activities, the Supreme Court has consistently reminded us that, to the extent possible, "the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted."

Don't Tear It Down v. Pennsylvania Avenue Development Corp., 642 F.2d 527, 534 (D.C. Cir. 1980) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973) (quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963))).²⁴

In determining whether an irreconcilable and inevitable conflict exists, and whether the principles of preemption require

24. See *Louisiana Public Service Commission v. Federal Communications Commission*, 106 S. Ct. 1890, 1899 (1986); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978); *De Canas v. Bica*, 424 U.S. 351, 357-58 n.5 (1973); *Dublino*, 413 U.S. at 413-14; *Coldstein v. California*, 412 U.S. at 567-69.

that state law yield to subordinating federal legislation, we must examine whether there exists "potential conflict of rules of law, of remedy, and of administration." *Garmon*, 359 U.S. at 242.²⁵ Here there is no danger of such conflicts. First, there are no federal administrative agencies that superintend, or any federal rules of law that cover, the disposition of the underlying personal injury claims. Thus, these cases are readily distinguishable from those where preemption has been found necessary. See e.g. *Transcontinental Gas Pipe v. State Oil-and Gas Board*, 106 S. Ct. 709, 717 (1986) (state regulation disturbs uniform scheme of federal energy regulation); *Ray v. Atlantic Richfield*, 435 U.S. at 165 (state ship construction standards in direct conflict with uniform federal construction standards); *id.* at 161, 163, 168; *City of Burbank*, 411 U.S. at 639 (local airport noise control rules in conflict with standards established by a federal administrative agency); *Metropolitan Life*, 105 S. Ct. at 2394; *Vaca v. Sipes*, 386 U.S. 171, 178-79 (1967), and *Garmon*, 359 U.S. at 242 (federal labor law preemption grounded on the need to protect the "primary jurisdiction" of the National Labor Relations Board).

Second, there is no danger of a conflict in remedies. Indeed, far from the existence of two distinct and different remedial systems, there is but one remedy, and a federal one at that. See *Wisconsin Dept. of Industry v. Gould, Inc.*, 106 S. Ct. 1057, 1061 (1986); *Exxon Corp. v. Hunt*, 106 S. Ct. at 1116. The employee claimants seek to pursue actions in state courts, on the basis of a federal law, FELA, which itself derives its substantive principles from state common law.

Ultimately Conrail's financial burden argument proves too much, as it would logically mandate the preemption of all state laws that add costs to the operation of the railroad. Conrail's contentions regarding "pervasive regulation" and "dominant interest" are unconvincing; so too is its "frustration of federal purpose" argument.

In the final analysis we are bound by Congress' intent. Although the legislative history of § 709(b) makes clear that the

25. See *Local 926*, 460 U.S. at 676-77; *Sears*, 436 U.S. at 188-89; *Farmer*, 430 U.S. at 297; *Lockridge*, 403 U.S. at 285-86.

liability for "[a]ll cases or claims . . . for personal injury . . . against a railroad in reorganization . . ." was ultimately to be borne by the railroads in reorganization, both NRSA and its legislative history are completely silent with respect to who should assume liability for claims for occupational injuries which did not manifest themselves until after the bankrupt railroads had been reorganized and were no longer "railroads in reorganization," that is to say claims not subject to § 709(b).

We must assume that Congress knew that railroad workers were susceptible to latent occupational diseases which might not manifest themselves until after the bankrupt railroads had been reorganized and discharged in bankruptcy;²⁶ and that it also knew that such workers would not be able to avail themselves of the unique opportunities provided by § 709(b). However, Congress' failure to make specific provisions for these employees in the Rail Act²⁷ can hardly be interpreted as a determination that they be bereft of any otherwise available remedy. There is no discernible reason to suppose that the same Congress which expressly provided that workers who had the opportunity to bring FELA claims for preconveyance injuries prior to the consummation of bankruptcy proceedings would be entitled to full and expedited relief intended, *sub silentio*, to foreclose any available remedy from those workers who did not (and through no fault of their own could not) file identical claims until after their former employers had been discharged in bankruptcy. At any rate we find no basis for inferring such congressional intent.

We believe that in these cases § 709(b) is neither a sword for the employee claimants nor a shield for Conrail and Amtrak. We

26. *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979); See *Urie v. Thompson*, 337 U.S. 163 (1949) (holding that FELA claims for latent occupational diseases may be filed upon "discovery" of the injury). See also 82 C.J.S. "Statutes" § 316 at 541-44 & nn. 88-92.

27. Like many statutes, the Rail Act and its progeny contain "some internal inconsistencies, vague language, and areas of uncertainty. It is not a perfect puzzle into which all the pieces fit." *Louisiana Public Service Commission v. Federal Communications Commission*, 106 S. Ct. 1890, 1904 (1986).

therefore hold that: (1) § 709(b) affords no separate basis for recovery of civil damages by the employee claimants; and (2) § 709 has no preemptive effect on these cases.

An appropriate order is attached.

Oliver Gasch, Presiding Judge

William B. Bryant, Judge

Charles R. Weiner, Judge

Date: January 27, 1987

SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973

CONSOLIDATED RAIL CORPORATION,)	
Plaintiff,)	
and)	
UNITED STATES OF AMERICA and)	
UNITED STATES RAILWAY)	
ASSOCIATION)	
Intervenors,)	§ 1152 Panel
v.)	C.A. No. 82-29
READING COMPANY, CARL SCHOL-)	
ING, on behalf of himself, and all oth-)	
ers similarly situated; and WOODROW)	
W. SCHWAMBACH, on behalf of him-)	
self and all others similarly situated,)	
Defendants.)	
CONSOLIDATED RAIL CORPORATION,)	
UNITED STATES RAILWAY ASSOCIA-)	
TION, and UNITED STATES OF AMER-)	
ICA,)	§ 1152 Panel
Plaintiffs,)	C.A. No. 84-9
v.)	
ERIE LACKAWANNA, INC.,)	
FLOYD PATRICK, et al.,)	
Defendants.)	
FRANCIS PUISHIS, Executor of the)	
Estate of Anthony J. Puishis, PHILLIP)	
ANGELLO and JOHN C. HENNING,)	§ 1152 Panel
Plaintiffs,)	C.A. No. 85-2
v.)	
NATIONAL RAILROAD PASSENGER)	
CORPORATION and CONSOLIDATED)	
RAIL CORPORATION,)	
Defendants.)	

ORDER

These matters are before the court on cross-motions for summary judgment. Upon consideration of these motions, the memoranda filed in support of and in opposition to these motions, and the entire record of these cases, the court hereby

DECLARES that the Consolidated Rail Corporation and the National Railroad Passenger Corporation are not liable for damages under § 709(b) of the Rail Act, 45 U.S.C. § 797h(b), for personal injuries and deaths allegedly suffered by Carl Scholing, Woodrow W. Schwambach, Anthony J. Puishis, Phillip Angello, John C. Henning, Floyd Patrick, Dolores Anderson, Frank Vigiani, Walter Mathias, Edward Hinan, Albert Thomas, William Abrams, Thomas Luskie, and Sandra Quirk.

The court further

DECLARES that neither § 709(b), nor any provisions of the Northeast Rail Service Act of 1981, preempts state common law principles of successor liability, and that, accordingly, the above-named individuals are free to pursue actions for damages in federal or state courts as they may choose.

Oliver Gasch, Presiding Judge

William B. Bryant, Judge

Charles R. Weiner, Judge

Date: January 27, 1987

SECTION FIFTY-SEVEN (11 U.S.C. § 93)

§ 57. **Proof and Allowance of Claims.** a. A proof of claim shall consist of a statement, in writing and signed by a creditor, setting forth the claim; the consideration therefor; whether any and, if so, what securities are held therefor; and whether any and, if so, what payments have been made thereon; and that the claim is justly owing from the bankrupt to the creditor. A proof of claim filed in accordance with the requirements of the Bankruptcy Act, the General Orders of the Supreme Court, and the official forms, even though not verified under oath, shall constitute prima facie evidence of the validity and amount of the claim.

b. Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court upon leaving a copy thereof on file with the claim.

c. Proofs of claim may, for the purpose of allowance, be filed by the claimants in the court of bankruptcy where the proceedings are pending or before the referee if the case has been referred.

d. Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest or unless their consideration be continued for cause by the court upon its own motion: *Provided, however,* That an unliquidated or contingent claim shall not be allowed unless liquidated or the amount thereof estimated in the manner and within the time directed by the court; and such claim shall not be allowed if the court shall determine that it is not capable of liquidation or of reasonable estimation or that such liquidation or estimation would unduly delay the administration of the estate or any proceeding under this Act.

e. Claims of secured creditors and those who have priority may be temporarily allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be thus temporarily allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.

f. Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit.

g. The claims of creditors who have received or acquired preferences, liens, conveyances, transfers, assignments or encumbrances, void or voidable under this Act, shall not be allowed unless such creditors shall surrender such preferences, liens, conveyances, transfers, assignments, or encumbrances.

h. The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors, or by such creditors and the trustee by agreement, arbitration, compromise or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance. Such determination shall be under the supervision and control of the court.

i. Whenever a creditor whose claim against a bankrupt estate is secured, in whole or in part, by the individual undertaking of a person, fails to prove and file that claim, that person may do so in the creditor's name, and he shall be subrogated to the rights of the creditor, whether the claim has been filed by the creditor or by him in the creditor's name, to the extent that he discharges the undertaking except that in absence of an agreement to the contrary, he shall not be entitled to any dividend until the amount paid to the creditor on the undertaking plus the dividends paid to the creditor from the bankrupt estate on the claim equal the amount of the entire claim of the creditor. Any excess received by the creditor shall be held by him in trust for such person.

j. Debts owing to the United States or to any State or any subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued on the amount of such loss according to law.

k. Claims which have been allowed may be reconsidered for cause and reallocated or rejected in whole or in part according to the equities of the case, before but not after the estate has been closed.

l. Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part, and the trustee may also recover any excess dividend paid to any creditor. The court shall have summary jurisdiction of a proceeding by the trustee to recover any such dividends.

m. The claim of any estate which is being administered in bankruptcy against any like estate may be proved and filed by the receiver or trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors.

n. Except as otherwise provided in this Act, all claims provable under this Act, including all claims of the United States and of any State or any subdivision thereof, shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed: *Provided, however*, That the court may, upon application before the expiration of such period and for cause shown, grant a reasonable fixed extension of time for the filing of claims by the United States or any State or any subdivision thereof: *Provided further*, That the right of infants and insane persons without guardians, without notice of the bankruptcy proceedings, may continue six months longer: *And provided further*, That a claim arising in favor of a person by reason of the recovery by the trustee from such person of money or property, or the avoidance by the trustee of a lien held by such

person, may be filed within thirty days from the date of such recovery or avoidance, but if the recovery is by way of a proceeding in which a final judgment has been entered against such person, the claim shall not be allowed if the money is not paid or the property is not delivered to the trustee within thirty days from the date of the rendering of such final judgment, or within such further time as the court may allow. When in any case all claims which have been duly allowed have been paid in full, claims not filed within the time hereinabove prescribed may nevertheless be filed within such time as the court may fix or for cause shown extend and, if duly proved, shall be allowed against any surplus remaining in such case. .

REORGANIZATION OF RAILROADS ENGAGED IN INTERSTATE COMMERCE

Section 77. Reorganization of Railroad Engaged in Interstate Commerce.

(a) Any railroad corporation may file a petition stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization.

The petition shall be filed with the court in whose territorial jurisdiction the corporation, during the preceding six months of the greater portion thereof, has had its principal executive or operating office, and a copy of the petition shall at the same time be filed with the Interstate Commerce Commission (hereinafter called the "Commission".)

When any railroad, although engaged in interstate commerce, lies wholly within one State, the proceedings shall be brought in the United States district court for the district in which its principal operating office has been located during the preceding six months or the greater portion thereof.

The petition shall be accompanied by payment to the clerk of a filing fee of \$150.

Upon the filing of such a petition, the judge shall enter an order either approving it as properly filed under this section, if satisfied that it complies with this section and has been filed in good faith, or dismissing it, if he is not so satisfied.

If the petition is so approved, the court in which the order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a court of the United States would have had if it had appointed a receiver in equity of the property of the debtor for any purpose.

Process of the court shall extend to and be valid when served in any judicial district.

The Supreme Court of the United States shall promulgate rules relating to the service of process outside of the district in

which the proceeding is pending, and any other rules which it may deem advisable in order to aid district courts and courts of appeal in exercising the jurisdiction herein conferred upon them.

The railroad corporation shall be referred to in the proceedings as a "debtor."

Any railroad corporation the majority of the capital stock of which having power to vote for the election of directors is owned, either directly or indirectly through an intervening medium, by any railroad corporation filing a petition as a debtor may file, with the court in which the other debtor has filed such a petition, and in the same proceeding, a petition, a copy of which shall also be filed at the same time with the Commission, stating that it is insolvent or unable to meet its debts as they mature, and that it desires to effect a reorganization in connection with, or as a part of the plan of reorganization of the other debtor; and upon the filing of the petition, the judge shall enter an order either approving it as properly filed under this section, if satisfied that it complies with this section and has been filed in good faith, or dismissing it if not so satisfied, and thereupon the court, if it approves the petition, shall have the same jurisdiction with respect to such debtor, its property and its creditors and stockholders, as the court has with respect to the other debtor.

Creditors of any railroad corporation, having claims aggregating not less than 5 percentum of all the indebtedness of the corporation as shown in the latest annual report which it has filed with the Commission at the time when the petition is filed, may, if the corporation has not filed a petition under this section, file with the court in which the corporation might file a petition under this section, a petition stating that the corporation is insolvent or unable to meet its debts as they mature and that the creditors have claims aggregating not less than 5 percentum of all such indebtedness of the corporation and propose that it shall effect a reorganization; copies of the petition shall be filed at the same time with the Commission and served upon the corporation.

The corporation shall, within ten days after such service, answer the petition.

If the answer admits the jurisdiction of the court and the material allegations of the petition, the judge shall enter an order approving the petition as properly filed if satisfied that it complies with this section and has been filed in good faith, or dismissing it, if not so satisfied. If the answer denies either the jurisdiction of the court or any material allegation of the petition, the judge shall summarily determine the issues presented by the pleadings without the intervention of a jury, and if he finds that the material allegations are sustained by the proofs and that the petition complies with this section and has been filed in good faith, the judge shall enter an order approving the petition; otherwise, he shall dismiss the petition.

If such a petition is so approved, the proceedings thereon shall continue with like effect as if the railroad corporation had itself filed a petition under this section.

If a petition is dismissed, neither the petition nor the answer of a debtor constitute an act of bankruptcy or an admission of insolvency or of inability to meet maturing obligations or be admissible in evidence, without the debtor's consent, in any proceedings then or thereafter pending or commenced under this Act or in any State or United States court.

If, in any case in which the issues have not already been tried under the provisions of this subdivision, any of the creditors, prior to the hearing provided for in paragraph (1) of subsection (c) of this section, appear and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, and, unless the material allegations of the petition are sustained by the proofs, shall dismiss the petition.

(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not

otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations, the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the curing or waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, the amendment of the charter of the debtor and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section.

The adoption of an executory contract or unexpired lease by the trustee or trustees of a debtor shall not preclude a rejection of such contract or lease in a plan of reorganization approved hereunder, and any claim resulting from such rejection shall not have priority over any other claims against the debtor because

such contract or lease had been previously adopted. The term "securities" shall include evidences of indebtedness either secured or unsecured, bonds, stock, certificates of beneficial interest therein, certificates of beneficial interest in property, options, and warrants to receive, or to subscribe for, securities. The term "stockholders" shall include the holders of voting-trust certificates. The term "creditors" shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.

The term "claims" includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character. For all purposes of this section unsecured claims, which would have been entitled to priority if a receiver in equity of the property of the debtor had been appointed by a Federal court on the day of the approval of the petition, shall be entitled to such priority and the holders of such claims shall be treated as a class or classes of creditors. In case an executory contract or unexpired lease of property shall be rejected, or shall not have been adopted by a trustee appointed under this section, or shall have been rejected by a receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, or shall be rejected by any plan, any person injured by such nonadoption or rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings. The provisions of section 60 of this Act shall apply to a proceeding under this section. For all purposes of this section any creditor or stockholder may act in person or by an attorney at law or by a duly authorized agent or committee subject to the provisions of subsection (p) hereof. The running of all statutes of limitation shall be suspended during the pendency of a proceeding under this section.

(c) After approving the petition:

(1) The judge shall forthwith (and in pending proceedings immediately upon the effective date of this amendatory section) require the debtor to give such notice as the order may direct to the mortgage trustees, creditors and stockholders, and to cause publication thereof for such period and in such newspapers as the judge may direct, of a hearing to be held not later than thirty days after the date of such order, at which hearing or any adjournment thereof the judge shall appoint one or more trustees of the debtor's property. Such appointments shall become effective upon ratification thereof by the Commission without a hearing, unless the Commission shall deem a hearing necessary. Where a trustee is appointed who within one year prior thereto has been an officer, director, or employee of the debtor corporation, any subsidiary corporation, or any holding company connected therewith, the judge, subject to ratification by the Commission as herein provided, shall appoint another trustee or trustees who shall not have had any such affiliations: *Provided*, That the appointment of such additional trustee or trustees shall not be required for a debtor the annual operating revenues of which were less than \$1,000,000 for the previous calendar year.

(2) The judge shall fix the amount of the bond of every trustee. He may thereafter terminate any such appointments on cause shown, and may in that event and in the event of a vacancy from any other cause, in the manner and within the qualifications herein provided for the appointment of trustees, appoint a substitute trustee or trustees, and in the same manner and within the same qualifications may appoint an additional trustee, and shall fix the amount of the bond of every such substitute or additional trustee or trustees. The judge shall in his discretion confirm the appointment of such legal counsel for the trustees as they shall select, with power of removal. The trustee or trustees and their counsel shall receive only such compensation from the estate of the debtor as the judge may from time to time allow within such maximum limits as may be approved by the

Commission as reasonable. The trustee or trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to section 44 of this Act or any other section of this Act, and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding, and, subject to the control of the judge and the jurisdiction of the Commission as provided by the Interstate Commerce Act as now or hereafter amended, the power to operate the business of the debtor. In operating the business of the debtor with respect to safety, location of tracts, and terminal facilities, the trustee or trustees shall be subject to lawful orders of State regulatory bodies of statewide jurisdiction to the same extent as would the debtor if a petition respecting it had not been filed under subsection (a) of this section except that (A) any such order which would require the expenditure, or the incurring of an obligation for the expenditure, of money from the debtor's estate shall not become effective (a) unless the trustee or trustees, with the approval of the court, shall consent thereto, or (b) unless the Commission, upon appropriate application or applications by an interested party or interested parties, shall find that compliance with the order will not impair the ability of the trustee or trustees to perform his or their duties to the public, will not constitute an undue burden upon interstate commerce, will be compatible with the public interest, and will not interfere with the formulation and approval of a satisfactory plan of reorganization for the debtor, and (B) compliance shall be made with any applicable provision of the Interstate Commerce Act. Prior to the appointment of a trustee, the debtor on behalf of the court shall continue in the possession of the property and shall operate the business thereof during such period, and shall have all the title to the property and shall

exercise all power consistent with the provisions of this section, subject at all times to the control of the judge, and to such limitations, restrictions, terms and conditions as he may from time to time impose and prescribe.

(3) The judge may, upon not less than fifteen days' notice published in such manner and in such newspapers as the judge may in his discretion determine, which notice so determined shall be sufficient, for cause shown, and with the approval of the Commission, in accordance with section 20(a) of the Interstate Commerce Act, as now or hereafter amended, authorize the trustee or trustees to issue certificates for cash, property, or other consideration approved by the judge, for such lawful purposes and upon such terms and conditions and with such security and such priority in payments over existing obligations, secured or unsecured, or receivership charges, as might in an equity receivership be lawful. Where such certificates are authorized to provide funds to pay for the acquisition, assembly or installation of safety equipment or materials related thereto, or for the purpose of reimbursing the trustee or trustees for funds so expended, the judge may direct (without limitation of his power to make such direction in the absence of this provision) that the certificate shall have such lien on the property of the debtor and shall be entitled to such priority in payments over existing obligations, secured or unsecured, and receivership charges and present or future duties, debt, or taxes or other obligations in favor of or payable to any State or any subdivision, agency or instrumentality thereof and interest or penalties, and to such parity with all or any portion of the other costs or expenses of administration or operation as in the particular case the judge may find equitable at the time of authorizing the issuance of such certificates, regardless of whether such obligations, charges, costs or expenses, duties, debts, or taxes constitute or are secured by liens on real or personal property or shall have become payable before or after the issuance of such certificates.

(4) The judge shall require the officers of the debtor or the trustee or trustees at such time or times as the judge may direct, and in lieu of the schedules required by section 7 of this Act, to file with the court such schedules and submit such other information as may be necessary to disclose the conduct of the debtor's affairs and the fairness of any proposed plan; and shall direct the officers of the debtor, or the trustee or trustees, within such time as the judge shall set, to prepare and file with the court a list of all known bondholders and creditors of the debtor, and the amounts and character of their debts, claims, and securities, and the last known post-office address or place of business of each bondholder and creditor, and a list of all known stockholders of the debtor, with the last known post-office address or place of business of each, which lists the judge may require to be brought down to date at any time. The contents of such lists shall not constitute admissions by the debtor or the trustees in a proceeding under this section or otherwise.

(5) It shall be the duty of anyone having information as to the names and addresses of the holders of any securities of the debtor to divulge such information to the trustee or trustees, upon written request therefor and, upon petition by any party in interest, and after hearing, the judge may order the production of any such information by anyone having and refusing to divulge it to any trustee, upon written request therefor. The judge may direct that the cost of preparing such information shall be borne by the debtor's estate.

(6) If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of

the lessor until the abandonment of such line is authorized in accordance with the provisions of section 1 of the Interstate Commerce Act as amended, or until such operation pursuant to this paragraph is otherwise lawfully terminated. During any such operation, the lessor shall be deemed to be a carrier subject to all applicable provisions of the Interstate Commerce Act, as amended, and shall be entitled to receive just, reasonable, and equitable divisions of rates, fares, or charges applicable to the transportation of persons or property over its line or lines of railroad and the lines of the lessee or other carriers, and the provisions of section 15(6) of the Interstate Commerce Act, as now or hereafter amended, shall apply to said divisions whether or not joint rates covering such transportation have been established.

(7) The judge shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown, the manner in which such claims may be filed or evidenced and allowed, and for the purpose of the plan and its acceptance, after notice and hearing, the division of creditors and stockholders into classes according to the nature of their respective claims and interests. Such division shall not provide for separate classification unless there be substantial differences in priorities, claims, or interests. The trustee or trustees under any mortgage, deed of trust, or indenture outstanding against the property may, within the time prescribed, file a verified claim in behalf of all bonds or securities outstanding under such mortgage, deed of trust, or indenture, in which event it shall be unnecessary for the holders of such bonds or securities to file claims in their own behalf, but nothing herein shall constitute such trustee or trustees the representative or representatives of such holders for the purpose of accepting or rejecting any plan or reorganization.

(8) The judge shall cause reasonable notice of the period in which claims may be filed, of hearings on application

for the dismissal of the proceedings, or for the final allowance of fees or expenses to be given creditors and stockholders by publication or otherwise.

(9) The judge shall direct the trustee or trustees, and may request the Commission through such of its agencies as it may designate, to report to him any facts pertaining to irregularities, fraud, misconduct, or mismanagement, as a consequence of which the debtor may have a cause of action arising therefrom against any person or corporation.

(10) The judge may direct the debtor or the trustee or trustees to keep records and accounts, in addition to the accounts prescribed by the Commission, as will permit of such a segregation and allocation, as the necessities of the case may require, of the earnings and expenses between and to the divisions and parts of the railroad or other property of the debtor which are separately subject to the liens of the various mortgages or deeds of trust, or are separately subject to lease, and may refer to the Commission for its recommendations after hearings thereon if the parties shall so request and/or the Commission determine necessary or desirable, as to the method or formula by which such segregation and allocation shall be made; and thereafter such segregation and allocation may be made at the expense of the debtor's estate.

(11) The Commission may direct such of its agencies as it may designate to file in the proceedings before the Commission a report, and additional or supplemental reports at such time or times as the Commission shall designate, of such data with reference to the property, business, earnings, and corporate organization of the debtor and such other facts as the Commission, after hearing if it deems necessary, shall determine to be necessary or helpful information for the purposes of the preparation of reorganizing plans, and for the purpose of aiding in determining the method or formula of allocating earnings permitted by subdivision (10) of this subsection (c). Such report or reports

shall be prima facie evidence of the facts therein stated in any proceeding under this section. The actual cost of preparing said report or reports shall be certified by the Commission and shall be borne by the debtor's estate.

(12) Within such maximum limits as are fixed by the Commission, the judge may make an allowance, to be paid out of the debtor's estate, for the actual and reasonable expenses (including reasonable attorney's fees) incurred in connection with the proceedings and plan by parties in interest and by reorganization managers and committees or other representatives of creditors and stockholders and within such limits may make an allowance to be paid out of the debtor's estate for the actual and reasonable expenses incurred in connection with the proceedings and plan and reasonable compensation for services in connection therewith by trustees under indentures, depositaries and such assistants as the Commission with the approval of the judge may especially employ. Appeals from orders of the court fixing such allowances may be taken to the circuit court of appeals independently of other appeals in the proceeding and shall be heard summarily. The Commission shall, at such time or times as it may deem appropriate, after hearing, fix the maximum allowances which may be allowed by the court pursuant to the provisions of paragraph (12) of this subsection (c) and, after hearing if the Commission shall deem it necessary, the maximum compensation which may be allowed by the court pursuant to the provisions of paragraph (2) of this subsection (c).

(13) The judge may on his own motion or at the request of the Commission refer any matters for consideration and report, either generally or upon specified issues, to one of several special masters who shall have been previously designated to act as special masters in any proceedings under this section by order of any circuit court of appeals and may allow such master a reasonable compensation for his services and actual and reasonable expenses. The circuit court

of appeals of each circuit shall designate three or more members of the bar as such special masters whom they deem qualified for such services, and shall from time to time revise such designations by changing the persons designated or their number, as the public interest may require: *Provided, however,* That there shall always be three of such special masters qualified for appointment in each circuit who shall hear any matter referred to them under this section by a judge of any district court. The debtor, any creditor or stockholder, or the duly authorized committee, attorney or agent of either or the trustee or trustees of any mortgage, deed of trust or indenture pursuant to which securities of the debtor are outstanding, shall have the right to be heard on all questions arising in the proceedings, and, upon petition therefor and cause shown, any such person or any other interested party may be permitted to intervene. The judge may, after hearing, make reasonable rules defining the matters upon which notice shall be given to other than interveners and the manner of giving such notice.

(d) The debtor, after a petition is filed as provided in subsection (a), shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, or if heretofore approved, then within six months of the effective date of this Act, and not thereafter unless such time is extended by the judge from time to time for cause shown, no single extension at any one time to be for more than six months. Such plan shall also be filed with the Commission at the same time. Such plans may likewise be filed at any time before, or with the consent of the Commission during, the hearings hereinafter provided for, by the trustee or trustees, or by or on behalf of the creditors being not less than 10 per centum in amount of any class of creditors, or by or on behalf of any class of stockholders being not less than 10 per centum in amount of any such class, or with the consent of the Commission by any party in interest. After the filing of such a plan, the Commission,

unless such plan shall be considered by it to be prima facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

The Commission may thereafter, upon petition for good cause shown filed within sixty days of the date of its order, and upon further hearings if the Commission shall deem necessary, in a supplemental report and order modify any plan which it has approved stating the reasons for such modification. The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan. No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court.

(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and

stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) hereof. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) hereof, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge:

Provided, That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: *Provided further*, That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the interests of claims thereof shall be deemed to be affected by the plan, and the President of the United States or any officer or an agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States, or of such agency or other corporation. The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate. The Commission shall certify to the judge the results of such submission.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in

said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided*, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e): *Provided Further*, That if, in any reorganization proceeding under this section, the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against, the debtor, as creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance, certified to the court, of a lesser amount by the President of the United States or the office or agency designated by him pursuant to the provisions of the preceding paragraph hereof: *Provided Further*, That if the President of the United States or such officer or agency shall fail to accept or reject such lesser amount for more than ninety days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed. If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. In the event of such a

reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts.

(f) Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed whether or not approved, including creditors who have not, as well as those who have, accepted it. Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan

be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of the Interstate Commerce Act as now or hereafter amended. The provisions of title 1 and of section 5 of the Securities Act of 1933, as amended, shall not apply to the issuance, sale, or exchange of any of the following securities, which securities and transactions therein shall, for the purposes of said Securities Act, be treated as if they were specifically mentioned in sections 3 and 4 of the said Securities Act, respectively: (1) All securities issued pursuant to any plan of reorganization confirmed by the judge in accordance with the provisions of this section; (2) all securities issued pursuant to such plan for the purpose of raising money for working capital and other purposes of such plan; (3) all securities issued by the debtor or by the trustee or trustees pursuant to subdivision (c), clause (3) of this section; (4) all certificates of deposit representing securities of, or claims against, the debtor, with the exception of such certificates of deposit as are issued by committees not subject to subsection (p) hereof. The provisions of subdivision (a) of section (14) of the Securities Exchange Act of 1934 shall not be applicable with respect to any action or matter which is within the provisions of subsection (p) hereof.

(g) If in the light of all the existing circumstances there is undue delay in a reasonably expeditious reorganization of the debtor, the judge, in his discretion, shall, on motion of any party

in interest or on his own motion, after hearing and after consideration of the recommendation of the Commission, dismiss the proceedings. Upon the filing of such an order of dismissal, all right, title, or interest of the trustee or trustees shall vest by operation of law in the debtor unless otherwise provided by such order.

(h) The provisions of subdivisions 1, 2, and 3 of Schedule A of title VIII of the Revenue Act of 1926, as amended by sections 721, 722 and 723 of the Revenue Act of 1932, and the provisions of subdivisions 8 and 9 of the same schedule A as added by sections 724 and 725 of the Revenue Act of 1932, and any amendments thereto unless specifically providing to the contrary, shall not apply to the issuance, transfer, or exchange of securities or the making or delivery of conveyances to make effective any plan of reorganization confirmed under the provisions of this section.

(i) If a receiver or trustee of all or any part of the property of a debtor has been appointed by a Federal or State court whether before or after this amendatory section takes effect, a petition or answer may be filed under this section at any time thereafter by such debtor, or its creditors as provided in subsection (a) of this section, and if such petition is approved, the trustee or trustees appointed under this section, or the debtor until such trustee or trustees are appointed, shall be entitled forthwith to possession of and be vested with title to such property, and the judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver or receivers or prior trustee or trustees and for the payment of such reasonable administrative expenses and allowances in the prior proceedings as may be fixed by the court appointing such receiver or trustee. Whether or not a receiver or trustee has been appointed by a Federal or State court prior or subsequent to the institution of a proceeding under this section and upon the dismissal of such proceeding under this section, the judge may include in the order of dismissal appropriate provisions directing the trustee or trustees, or the debtor if no trustee has been appointed, at the time of such order of dismissal to transfer possession of the debtor's property within the territorial jurisdiction of such Federal or State court to the prior receiver or trustee, if

a prior receiver or trustee has been so appointed by such Federal or State court, or to a receiver or trustee appointed by such Federal or State court, upon such terms as the court in the proceeding under this section may deem equitable for the protection of the obligations incurred by any trustee or trustees appointed under this section and for the payment of administration expenses and allowances in the proceeding hereunder. Upon the filing of such order of dismissal all title to the property in the trust estate shall vest as therein provided. For the purposes of this section the words "Federal court" shall include the district courts of the United States and the Territories and possessions to which this title is or may hereafter be applicable, the Supreme Court of the District of Columbia, and the United States Court of Alaska.

(j) In addition to the provisions of section 11 of this Act for the staying of pending suits against the debtor, the judge may enjoin or stay the commencement or continuation of suits against the debtor until after final decree; and may, upon notice and for cause shown, enjoin or stay the commencement or continuance of any judicial proceeding to enforce any lien upon the estate until after final decree: *Provided*, That suits or claims for damages caused by the operation of trains, busses, or other means of transportation may be filed and prosecuted to judgment in any court of competent jurisdiction and any order staying the prosecution of any such cause of action or appeal shall be vacated. Proceedings under section 77 or under this amendatory Act shall not be grounds for the removal of any cause of action to the United States District Court which was not removable before the passage and approval of said section 77 and any order removing any cause of action or enjoining the prosecution of any such cause of action in any court is null and void and any cause of action heretofore removed from a State court on account of said section 77 shall be remanded to the court from which it was removed. The title of any owner, whether as trustee or otherwise, to rolling-stock equipment leased or conditionally sold to the debtor, and any right of such owner to take possession of such property in compliance with the provisions of any such lease or conditional sale contract, shall not be affected by the provisions of this section.

(k) A certified copy of the final order confirming a plan of reorganization, or of any other order or decree entered in a proceeding under this section, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and the fact that the order or decree was made. A certified copy of an order directing the transfer and conveyance of the property dealt with by the plan as provided in subsection (f) of this section, or as specified in an order dismissing the proceedings as provided in subsection (i), shall be evidence of the transfer and conveyance of title accordingly, and if recorded shall impart the same notice that a deed, if recorded, would impart.

(l) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed.

(m) The term "railroad corporation" as used in this amendatory section means any common carrier by railroad engaged in the transportation of persons or property in interstate commerce, except a street, a suburban, or interurban electric railway which is not operated as a part of a general railroad system of transportation or which does not derive more than 50 per centum of its operating revenues from the transportation of freight in standard steam railroad freight equipment. Wherever used in this section the term "person" shall include an individual, corporation, partnership, association, joint-stock company, unincorporated organization, or a government or political subdivision thereof.

(n) In proceedings under this section and in equity receiverships of railroad corporations now or hereafter pending in any court of the United States, claims for personal injuries to employees of a railroad corporation, claims of personal representatives of deceased employees of a railroad corporation, arising under State or Federal laws, and claims now or hereafter payable by sureties upon supersedeas, appeal, attachment, or garnishment bonds executed by sureties without security for and in any

action brought against such railroad corporation or trustee appointed pursuant to this section, shall be preferred against and paid out of the assets of such railroad corporation as operating expenses of such railroad. No judge or trustee acting under this Act shall change the wages or working conditions of railroad employees except in the manner prescribed in the Railway Labor Act, as amended June 21, 1934, or as it may be hereafter amended. No reorganization effected under this Act and no order of the Court or Commission in connection therewith shall relieve any carrier from the obligation of any final judgment of any Federal or State court rendered prior to January 1, 1929, against such carrier or against one of its predecessors in title, requiring the maintenance of offices, shops, and roundhouses at any place, where such judgment was rendered on account of the making of a valid contract or contracts by such carrier or one of its predecessors in title.

(o) The trustee or trustees, from time to time, shall determine what lines or portions of lines of railroad and what other property of the debtor, if any, should be abandoned or sold during the pendency of the proceedings in the interest of the debtor's estate and of ultimate reorganization but without unduly or adversely affecting the public interest, and shall present to the judge petitions, in which other parties in interest may join, for authority to abandon or to sell any such property; and upon order of the judge made after a hearing pursuant to such reasonable notice by publication or otherwise as the judge may direct to parties in interest, authorizing any such abandonment or sale, but only with the approval and authorization of the Commission when required by the Interstate Commerce Act as amended February 28, 1920, or as it may be hereafter amended, the trustee or trustees shall take all steps and carry out all proceedings necessary for the consummation of any such abandonment or sale in accordance with the order of the judge. Any such order of the judge shall be a final order for the purposes of appeal. The judge may order and decree any sale of property, whether or not incident to an abandonment, under this subsection at public or private sale and subject to or free from liens. The proceeds derived from any such sales shall be received by the trustee or

trustees subject, in case the property was sold free from lien, to any liens thereon at the time of sale, and shall be applied or disposed of in such manner as the judge by further order shall direct. The expense of such sale shall be borne in such manner as the judge may determine to be equitable. The judge may order the trustee or trustees of the debtor to deposit such proceeds with any mortgage trustee entitled thereto, to be applied in payment of all or part of such mortgage.

(p) It shall be unlawful for any person, during the pendency of proceedings under this section or of receivership proceedings against a railroad corporation in any State or Federal court, (a) to solicit, or permit the use of his name to solicit, from any creditor or shareholder of any railroad corporation by or against whom such proceedings have been instituted, any proxy or authorization to represent any such creditor or shareholder in such proceedings or in any matters relating to such proceedings, or to vote on his behalf for or against, or to consent to or reject, any plan or reorganization proposed in connection with such proceedings; or (b) to use, employ, or act under or pursuant to any such proxy or authorization from any such creditor or shareholder which has been solicited or obtained prior to the institution of such proceedings; or (c) to solicit the deposit by any such creditor, or shareholder, of his claim against or interest in such railroad corporation, or any instrument evidencing the same, under any agreement authorizing anyone other than such depositor to represent such depositor in such proceedings or in any matters relating to such proceedings, including any matters relating to the deposited security or claim; or to vote such claim or interest or to consent to or reject any such plan of reorganization; or (d) to use, employ, or act under or pursuant to any such agreement with such depositor which has been solicited or obtained prior to the institution of such proceedings; unless and until, upon proper application by any person proposing to make such solicitation or to use, employ, or act under or pursuant to such proxies, authorizations, or deposit agreements, and after consideration of the terms and conditions (including provisions governing the compensation and expenses to be received by the applicant, its agents and attorneys, for their services) upon which

it is proposed to make such solicitation or to use, employ, or act under or pursuant to such proxies, authorizations, or deposit agreements, the Commission after hearing by order authorizes such solicitation, use, employment, or action: *Provided, however*, That nothing contained in this section shall be applicable to or construed to prohibit any person, when not part of an organized effort, from acting in his own interest, and not for the interest of any other, through a representative or otherwise, or from authorizing a representative to act for him in any of the foregoing matters, or to prohibit groups of not more than twenty-five bona fide holders of securities or claims or groups of mutual institutions from acting together for their own interests and not for others through representatives or otherwise or from authorizing representatives of such groups to act for them in respect to any of the foregoing matters. The Commission shall make such order only if it finds that the terms and conditions upon which such solicitation, use, employment or action is proposed are reasonable, fair, and in the public interest, and conform to such rules and regulations as the Commission may provide. The Commission shall have the power to make such rules and regulations respecting such solicitation, use, employment, or action and with respect to the terms and the provisions of such proxies, authorizations, and deposit agreements, and with respect to such other matters in connection with the administration of this subsection as it deems necessary or desirable to promote the public interest, and to insure proper practices in the representation of creditors and stockholders through the use of such proxies, authorizations, or deposit agreements and in the solicitation thereof.

Every application for authority shall be made in such form and contain such matters as the Commission may prescribe. Every such application shall be made under oath, signed by, or on behalf of, the applicant by a duly authorized agent having knowledge of the matters therein set forth. The Commission may modify any order authorizing such solicitation, use, employment, or action by a supplemental order, but no such modification shall invalidate action previously taken, or rights or obligations which have previously arisen, in conformity with the Commission's

prior order or orders authorizing such solicitation, use, employment, or action.

The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provision of this subsection (p) or any rule or regulation thereunder, and may require or permit any person to file with it a statement in writing, under oath, or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized, in its discretion, to publish information concerning any such violations, and to investigate any such facts, conditions, practices, or matters as it may deem necessary or proper to aid in the enforcement of the provisions of this subsection (p), in the prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this subsection relates.

Any person who willfully violates any provision of this subsection, or any rule or regulation made thereunder the violation of which is made unlawful, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed hereunder or under any rule or regulation authorized hereby, which statement is false or misleading with respect to any material fact, shall be guilty of a misdemeanor, and on conviction in any United States court having jurisdiction, shall be punished by a fine of not less than \$1,000 nor more than \$10,000 or by imprisonment for not less than one year nor more than three years, or by both such fine and imprisonment, in the discretion of the court; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

The provisions of this subsection (p) shall not be applicable to any person or committee which has begun to solicit, obtain, or use proxies, authorizations, or deposit agreements prior to the effective date of this amendatory section in connection with proceedings under this section as in force prior to such effective date or receivership proceedings against a railroad then pending in

any State or Federal court, unless such person or committee makes application to the Commission and receives authority to act as in this subsection provided, in which event the provisions of this subsection (p) shall be applicable to such person or committee, but such authorization shall not be upon terms which shall invalidate any action theretofore taken, or any rights or obligations which have theretofore arisen: *Provided*, That with respect to committees which are not subject to this subsection (p) the judge shall scrutinize and may disregard any limitations or provisions of any deposit agreements, committee, or other authorizations affecting any creditor or stockholder acting under this section and may enforce an accounting thereunder or restrain the exercise of any power which he finds to be unfair or not consistent with public policy, including the collection of unreasonable amounts for compensation and expenses.

(q) The provisions of section 12 of the Interstate Commerce Act, as amended March 2, 1889, February 10, 1891, and February 28, 1920, shall be applicable to enable the Commission to perform its duties under this section and the provisions of such section shall apply to the debtor, any subsidiary or affiliated company or any other person as herein defined.

(r) If any provision of this amendatory section, or the application thereof to any person or circumstances, is held invalid, the remainder of this amendatory section, or application of such provision to other persons or circumstances, shall not be affected thereby.

(s) Proceedings pending under this section (Act of March 3, 1933) on the effective date of this amendatory section shall continue under, and be governed by the provisions of this amendatory section: *Provided*, That the enactment of this amendatory section shall not invalidate any action taken before its effective date pursuant to this section as it existed prior to the enactment of this amendatory section.

REGIONAL RAIL REORGANIZATION ACT OF 1973
(45 U.S.C. §701 *et seq.*)

Rail Act, §601(b)(4), 45 U.S.C. §791(b)(4).

The powers and duties of the Commission under section 77 of the Bankruptcy Act (11 U.S.C. 205), with respect to a railroad in reorganization in the region which conveys all or substantially all of its designated rail properties to the Corporation or a subsidiary thereof, or to profitable railroads in the region, pursuant to the final system plan, and the requirement that plans of reorganization be filed with the Commission, shall cease upon the date of such conveyance. The powers and duties of the Commission under section 77 of the Bankruptcy Act shall also so terminate, as of February 5, 1976, with respect to any railroad in reorganization under such section 77 of the Bankruptcy Act but not subject to this chapter which (1) does not separate any line of railroad, and (2) has transferred all or substantially all of its rail properties to a railroad in reorganization in the region which was subject to this chapter prior to February 5, 1976.

Thereafter, such powers and duties of the Commission shall be vested in the district court of the United States which has jurisdiction of the estate of any such railroad in reorganization at the time of such conveyance. Such court shall proceed to reorganize or liquidate such railroad in reorganization pursuant to such section 77 on such terms as the court deems just and reasonable, or pursuant to any other provisions of the Bankruptcy Act [11 U.S.C.A. §1 *et seq.*], if the court finds that such action would be in the best interests of such estate. This paragraph does not affect any obligation of any carrier by railroad subject to regulation under the Interstate Commerce Act (49 U.S.C.A. §1 *et seq.*). The powers and duties of the Commission under section 77 of the Bankruptcy Act shall continue in effect only to the extent that the railroad in reorganization continues to operate any line of railroad.

SECTION 726 (11 U.S.C. §726)

§726. Distribution of property of the estate.

(a) Except as provided in section 510 of this title, property of the estate shall be distributed—

(1) first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title;

(2) second, in payment of any allowed unsecured claim, other than a claim of a kind specified in paragraph (1), (3), or (4) of this subsection, proof of which is—

(A) timely filed under section 501(a) of this title;

(B) timely filed under section 501(b) or 501(c) of this title; or

(C) tardily filed under section 501(a) of this title, if—

(i) the creditor that holds such claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim under section 501(a) of this title; and

(ii) proof of such claim is filed in time to permit payment of such claim;

(3) third, in payment of any allowed unsecured claim proof of which is tardily filed under section 501(a) of this title, other than a claim of the kind specified in paragraph (2)(C) of this subsection;

(4) fourth, in payment of any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, arising before the earlier of the order for relief or the appointment of a trustee, to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary loss suffered by the holder of such claim;

(5) fifth, in payment of interest at the legal rate from the date of the filing of the petition, on any claim paid under paragraph (1), (2), (3), or (4) of this subsection; and

(6) sixth, to the debtor.

(b) Payment on claims of a kind specified in paragraph (1), (2), (3), (4), (5), (6) or (7) of section 507(a) of this title, or in paragraph (2), (3), (4), or (5) of subsection (a) of this section, shall be made pro rata among claims of the kind specified in each such particular paragraph, except that in a case that has been converted to this chapter under section 1112[,] [sic] 1208, or 1307 of this title, a claim allowed under section 503(b) of this title incurred under this chapter after such conversion has priority over a claim allowed under section 503(b) of this title incurred under any other chapter of this title or under this chapter before such conversion and over any expenses of a custodian superseded under section 543 of this title.

(c) Notwithstanding subsections (a) and (b) of this section, if there is property of the kind specified in section 541(a)(2) of this title, or proceeds of such property, in the estate, such property or proceeds shall be segregated from other property of the estate, and such property or proceeds and other property of the estate shall be distributed as follows:

(1) Claims allowed under section 503 of this title shall be paid either from property of the kind specified in section 541(a)(2) of this title, or from other property of the estate, as the interest of justice requires.

(2) Allowed claims, other than claims allowed under section 503 of this title, shall be paid in the order specified in subsection (a) of this section, and, with respect to claims of a kind specified in a particular paragraph of section 507(a) of this title or subsection (a) of this section, in the following order and manner:

(A) First, community claims against the debtor or the debtor's spouse shall be paid from property of the kind specified in section 541(a)(2) of this title, except to

the extent that such property is solely liable for debts of the debtor.

(B) Second, to the extent that community claims against the debtor are not paid under subparagraph (A) of this paragraph, such community claims shall be paid from property of the kind specified in section 541 (a)(2) of this title that is solely liable for debts of the debtor.

(C) Third, to the extent that all claims against the debtor including community claims against the debtor are not paid under subparagraph (A) or (B) of this paragraph such claims shall be paid from property of the estate other than property of the kind specified in section 541(A)(2) of this title.

(D) Fourth, to the extent that community claims against the debtor or the debtor's spouse are not paid under subparagraph (A), (B), or (C) of this paragraph, such claims shall be paid from all remaining property of the estate.

BANKRUPTCY CODE OF 1978**SECTION 1123 (11 U.S.C. §1123)****§1123. Contents of plan.**

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall—

(1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(1), 507(a)(2), or 507(a)(7) of this title, and classes of interests;

(2) specify any class of claims or interest that is not impaired under the plan;

(3) specify the treatment of any class of claims or interests that is impaired under the plan;

(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;

(5) provide adequate means for the plan's implementation such as—

(A) retention by the debtor of all or any part of the property of the estate;

(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;

(C) merger or consolidation of the debtor with one or more persons;

(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;

(E) satisfaction or modification of any lien;

(F) cancellation or modification of any indenture or similar instrument;

(G) curing or waiving of any default;

(H) extension of a maturity date or a change in an interest rate or other term of outstanding securities;

(I) amendment of the debtor's charter; or

(J) issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or (C) of this paragraph, for cash, for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose;

(6) provide for the inclusion in the charter of the debtor, if the debtor is a corporation, or of any corporation referred to in paragraph (5)(B) or (5)(C) of this subsection, of a provision prohibiting the issuance of nonvoting equity securities, and providing, as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any class of equity securities having a preference over another class of equity securities with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends; and

(7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee.

(b) Subject to subsection (a) of this section, a plan may—

(1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;

(2) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(3) provide for—

(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or

(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;

(4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests; and

(5) include any other appropriate provision not inconsistent with the applicable provisions of this title.

(c) In a case concerning an individual, a plan proposed by an entity other than the debtor may not provide for the use, sale, or lease of property exempted under section 522 of this title, unless the debtor consents to such use, sale, or lease.

SECTION 1129 (11 U.S.C. §1129)

§1129. Confirmation of plan.

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring

property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable;

(5)(A)(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

(7) With respect to of each impaired class of claims or interests

(A) each holder of a claim or interest of such class—
(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class of claims or interests—

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that—

(A) with respect to a claim of a kind specified in section 507(a)(1) or 507(a)(2) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

(B) with respect to a class of claims of a kind specified in section 507(a)(3), 507(a)(4), or 507(a)(5) of this title, each holder of a claim of such class will receive—

(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim; and

(C) with respect to a claim of a kind specified in section 507(a)(6) of this title, the holder of such claim will receive on account of such claim deferred cash payments, over a period not exceeding six years after the date of assessment of such claim, of a value, as of the

effective date of the plan, equal to the allowed amount of such claim.

(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides—

(i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of

such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

(B) With respect to a class of unsecured claims—

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

(C) With respect to a class of interests—

(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

(c) Notwithstanding subsections (a) and (b) of this section and except as provided in section 1127(b) of this title, the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144 of this title. If the requirements of subsections (a) and (b) of this section are met with respect to more than one plan, the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm.

(d) Notwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933 (15 U.S.C. 77e). In any hearing under this subsection, the governmental unit has the burden of proof on the issue of avoidance.

SECTION 1141 (11 U.S.C. §1141)

§1141. Effect of confirmation.

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan—

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not—

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if—

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.

(3)
No. 86-1612

Supreme Court, U.S.
FILED

MAY 6 1987

JOSEPH F. SPANIOLO,
CLERK

IN THE
Supreme Court of the United States
October Term, 1986

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

ERIE LACKAWANNA INC.,
JOHN HENNING, and VICTOR LaSCALA,

Respondents.

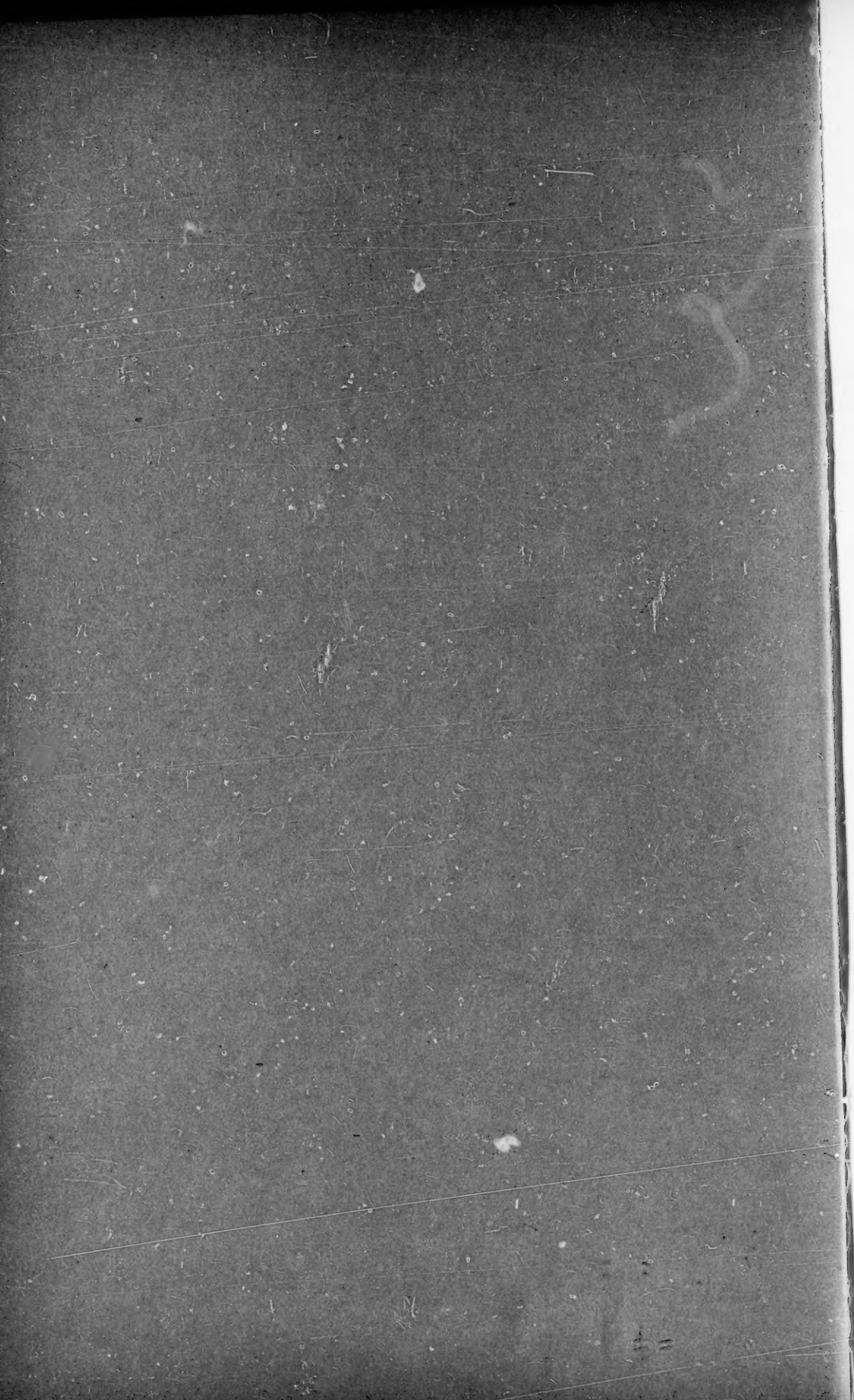
ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

**BRIEF IN OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI**

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the district court properly barred claims first asserted after the termination of a former railroad's bankruptcy proceeding, in respect of which Congress in the Rail Act had granted the court broad discretion to liquidate the assets remaining to the bankrupt railroad after the mandatory conveyance of its rail assets to Conrail, where the district court effected the bankrupt's liquidation and the distribution of its remaining assets to allowed creditors, at 52c per dollar of their allowed claims, through the vehicle of a liquidating corporation?

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

ERIE LACKAWANNA INC.,
JOHN HENNING, and VICTOR LASCALA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI

Respondent Erie Lackawanna Inc. ("Erie")¹
respectfully submits this brief in opposition to the petition for

1. Pursuant to Rule 28.1 of the Court, Erie provides the following listing: (1) parent companies: none; (2) subsidiaries (other than wholly-owned subsidiaries): Niagara Junction Railway Co. (minority interest).

writ of certiorari ("Pet.") of Consolidated Rail Corporation ("Conrail").

COUNTER-STATEMENT OF THE CASE

This case turns on the application of two virtually obsolete statutes — the Regional Rail Reorganization Act of 1973 (the "Rail Act") and Section 77 of the now repealed Bankruptcy Act of 1898² — to the unique facts of one former railroad's bankruptcy proceeding under those statutes. The judgment which petitioner asks the Court to revisit was reached unanimously by all four judges who considered the merits of the question.³ Not a single judge of the Sixth Circuit requested a vote on Conrail's petition for rehearing en banc (A-39).

Petitioner's Statement of the Case suggests that the court of appeals established a major precedent for pending and future reorganization proceedings. Yet a balanced summary of the proceedings shows that the opinion below can have no such impact. Notwithstanding petitioner's extravagant assertion that the court of appeals fashioned a means by which corporations can misuse generally applicable federal bankruptcy statutes, it is clear that the decision below was based on provisions of the Rail Act and Section 77 which do not apply to reorganizations in general and which have no further applicability even to railroad reorganizations. The only interest at stake on this petition for writ of certiorari is Conrail's claim to

2. The Bankruptcy Act of 1898 was superseded on October 1, 1979 by the Bankruptcy Reform Act of 1978.

3. The order of the district court affirmed below had been entered by the Hon. Robert B. Krupansky, United States Circuit Judge for the Sixth Circuit, sitting by designation on the district court, where he had presided over the bankruptcy proceeding as a district judge beginning in 1972. Judge Krupansky's order was affirmed by a unanimous panel of the court of appeals.

indemnity from the former creditors of the defunct Erie Lackawanna Railway Company and their assignees — a claim that was correctly resolved against petitioner after full and fair hearings in the two lower courts.

A. Background

In 1972, the Erie Lackawanna Railway Company (hereinafter referred to as "the Debtor" to distinguish it from respondent Erie) filed for relief under Section 77 of the Bankruptcy Act of 1898, a special railroad reorganization statute (formerly codified at 11 U.S.C. § 205) which, for reasons of national transportation policy, did not provide for liquidation of a debtor even if the debtor lacked sufficient earning power to continue its rail business as a reorganized carrier (A-6, A-9). Most of the railroads in the northeastern United States were in similar straits, and Congress recognized that the mechanism of Section 77 could not cope with so massive a problem. It therefore enacted the Regional Rail Reorganization Act of 1973 ("the Rail Act"), 45 U.S.C. §§ 701-797. The Rail Act created Conrail, required the bankrupt northeastern railroads to transfer their rail businesses to Conrail, and thereby effected a reorganization of those businesses entirely outside the framework of the Bankruptcy Act (A-2, A-9).

The mandatory conveyance of rail assets to Conrail which occurred on March 31, 1976 left the bankrupt railroad companies with the right to compensation from the United States for the property taken by Conrail, with miscellaneous assets, and with massive debts. Their estates were still in the custody of various district courts because of the pending Section 77 proceedings, and Section 601(b)(4) of the Rail Act (45 U.S.C. § 791(b)(4)) directed each court

to reorganize or liquidate such railroad in reorganization pursuant to Section 77 on such terms as the court deems just and reasonable, or pursuant to any other provisions of the

Bankruptcy Act, if the court finds that such action would be in the best interests of such estate.

The Rail Act thus explicitly empowered the district court to order liquidation of a debtor under Section 77, even though that Section did not contemplate liquidation and provided no rules or procedures for liquidation. In view of this statutory void, Congress vested broad discretion in the district court to liquidate the remaining assets of the former railroads "on such terms as the court deems just and reasonable."

In the instant case, the Debtor's liabilities far exceeded its assets, even after it had received more than \$300 million (including interest) in compensation from the United States for the assets conveyed to Conrail, and the Debtor had retained no income-producing assets around which to mold an operating company.⁴ Consequently, in 1982 the district court found the Debtor's stock to be worthless (A-48, A-51). It ordered that the sole stockholder receive nothing, that the cash assets be used to satisfy claims of secured and other priority creditors, and that the then remaining non-cash assets be liquidated over a six-year period for distribution of the proceeds (together with any remaining cash) to general creditors. Such distribution was effected by the issuance of the stock of what Judge Krupansky called the "liquidating corporation," *i.e.*, respondent Erie, provided for in what was denominated as the Debtor's plan of reorganization (the "Plan") (A-40). All proceeds realized from the liquidation and other cash earned from investment thereof were ordered to be placed in a Master

4. Petitioner incorrectly states that "[t]he Reorganized Company has exploited the value of the [Debtor's] net operating loss carry forwards. . . ." (Pet. at 13). On the contrary, the Debtor's losses referred to by petitioner were insufficient to offset the taxable interest income received by the Debtor prior to consummation of the plan for the assets conveyed to Conrail (A-90 to A-91).

Trust to assure payment of the priority claims (A-62 to A-63).⁵

Upon consummation of the Plan on November 30, 1982, the district court entered a Final Decree barring after-asserted claims. The decree permanently enjoined all persons from instituting any lawsuit against the liquidating corporation "based upon any right, claim or interest of any kind or nature whatsoever . . . against the Debtor" (A-129).

Contrary to petitioner's insinuations that Erie is an ongoing, profitable business (*e.g.*, Pet. at 11), Erie's sole authorized activity is the disposition of the remaining assets for the benefit of general creditors and their assignees, the investment of the Master Trust moneys pending distribution, and the settlement of tax liabilities and other claims asserted before consummation of the Plan but not then resolved (A-48 to A-49). In other words, petitioner seeks to enforce indemnity claims first asserted after the bar date, November 30, 1982, against assets already allocated by the court to carry out the satisfaction of allowed creditor claims at a loss.⁶

Under the broad discretion conferred upon the district court by the Rail Act, Judge Krupansky after March 1976 might have converted the Section 77 proceeding into a statutory liquidation under the Bankruptcy Act. But the

5. Under the terms of the Master Trust, the investment of all Master Trust moneys is restricted to risk-free or low-risk securities, and, except for the payment of priority claims and taxes and for working capital required to effect the liquidation, no assets may be withdrawn prior to the payment of all priority claims without approval of the district court (A-62 to A-63; A-224 to A-228; A-232 to A-233).

6. The circumstances of the Debtor in this case, therefore, differed substantially from those (for example) of the Reading Company and the Central Railroad of New Jersey — the ex-railroads involved in *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 106 S. Ct. 183 (1985). Neither of the reorganization plans of those railroads was a liquidating plan.

mechanism he chose instead — a liquidating corporation combined with a Master Trust — had compelling administrative advantages. Statutory liquidation would have subjected to the district court's supervision the sale of hundreds of pieces of remaining property, primarily unimproved real estate. This cumbersome procedure would have increased the administrative cost of liquidation and burdened the district court for no good reason, since the court's role as referee among the conflicting interests was no longer needed: the stockholder's interest had been completely extinguished, priority claims had all been provided for with cash pursuant to the liquidating plan, and the remaining creditors had agreed to be treated as a single class for pro rata distribution of the deficient residue.⁷ Another disadvantage of straight bankruptcy was the burden upon trade creditors who had no marketable securities evidencing their claims and would have to wait many years for pro rata distribution.

Both these problems were solved by the court's use of a liquidating corporation. This vehicle eliminated the need for court orders to authorize sales of remaining assets and permitted issuance of marketable securities — the new Erie capital stock — to unsecured creditors. The new capital stock was issued at the rate of one share per \$100 of allowed claim. Its book value, however, was only \$52 per share, and its market value upon issuance was substantially below book value (A-3, A-67, A-234).

The Plan approved by the district court *mandated* the sale of *all* the Debtor's assets and *mandated* the transfer of the proceeds of sale to the Master Trust for the benefit of allowed

7. The liquidating plan of reorganization made possible the approval under Section 77(e) (A-199 to A-200) of a large number of compromises of position among the various types of creditors as to priorities and amounts of valid claim without the necessity of either obtaining 100% approval by such creditors or litigating the issues to the bitter end that "straight liquidation" would have entailed.

priority creditors. As required by former Bankruptcy Rule 8-404(b), the Plan provided a five-year waiting period during which creditors were permitted to exchange debt certificates and executed satisfactions of claims for the consideration provided in the Plan. Approximately one year thereafter, dissolution of the liquidating corporation is required pursuant to both the Plan and Erie's charter, which state that Erie is "to be completely liquidated." The only way that dissolution can be avoided is by a charter amendment approved, after all claims have been paid or provided for, by a vote of not less than 75% of all stock outstanding, coupled with an appraisal right and payout to any dissenting shareholder who demands it (A-68 to A-69).⁸

B. The Proceedings Below

Two years after the Final Decree, several former employees of the Debtor brought suit against petitioner Conrail and in some cases against Conrail and the liquidating corporation, respondent Erie, for alleged personal injuries. Petitioner Conrail brought suit against Erie claiming indemnity for Conrail's liability on such personal injury claims. For the purpose of this case, it was assumed that these injuries did not become manifest until after consummation of the Plan, but were caused (at least in part) by on-the-job exposure to asbestos or other pathogens before 1976, while the Debtor was an operating railroad.⁹

8. Early in 1984, the Erie Board of Directors resolved to seek a vote extending Erie's life after final determination of Erie's tax liabilities and assuming no intervening material adverse events. This resolution was rescinded in May 1986 for reasons unrelated to this case.

9. One of the indemnity claims does not involve personal injury but Conrail's liability to the State of New York for a petroleum leak on property conveyed to Conrail by the Debtor. Moreover, in at least one of the personal injury cases involving a third-party claim by Conrail against Erie, Conrail was sued prior to the consummation date but did not commence its third-party claim until after that date.

In response to these claims, the liquidating corporation applied to Judge Krupansky for an order declaring that such suits were barred by the injunctive provisions of the Final Decree and for an injunction requiring their dismissal. Judge Krupansky granted the relief requested, holding, *inter alia*, that the Debtor–tortfeasor no longer exists and that the liquidating corporation is not the Debtor’s successor — indeed, is not an ongoing business at all, but merely a vehicle for liquidation (A–10, A–32).¹⁰

Conrail and two personal injury plaintiffs, respondents Henning and LaScala, appealed to the Sixth Circuit. On that appeal, a unanimous panel of the Sixth Circuit affirmed Judge Krupansky’s order. It held that the liquidating nature of the Debtor’s bankruptcy proceeding was dispositive and that the Rail Act gave the district court sufficient flexibility to bar after–asserted claims in a Rail Act–Section 77 reorganization–liquidation to the same extent as such claims would be barred in statutory liquidation (A–7 and n. 4). Since not even non–discharged claims can be enforced in “straight bankruptcy” so as to diminish the pro rata share in the estate of creditors whose claims — like those of the creditors who became the shareholders in the liquidating corporation — were filed before the bar date and allowed by the court, the court of appeals did not reach the question of discharge *vel non* presented in *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 106 S.Ct. 183 (1985) (A–2 n. 1). Conrail’s petition for rehearing en banc was denied.

10. Judge Krupansky also went on to analyze at length — and reject — the petitioner’s argument below that its claims were not discharged for the reasons stated by the Third Circuit in *Schweitzer*. Judge Krupansky declined to follow *Schweitzer*.

REASONS FOR DENYING THE PETITION

In order to conjure up an issue worthy of certiorari, petitioner first distorts the record of the Debtor's bankruptcy proceeding and the opinion of the court of appeals and then asserts that the Sixth Circuit has devised a new form of reorganization that is both unauthorized by federal bankruptcy statutes and in conflict with decisions in other circuits. Nothing could be further from the truth. The judge who presided for ten years over the Debtor's Rail Act-Section 77 proceeding understood the liquidating nature of that proceeding. Based on that understanding, he explicitly found that respondent Erie is not an ongoing business and is not the Debtor's successor. In holding that petitioner cannot pursue its claims against respondent Erie as if it were the Debtor's successor, the court of appeals did not "concoct" anything "retroactively" (Pet. at 7). Rather, it correctly applied the Rail Act and Section 77 to the facts found by the district court and fully supported by the record.

The Rail Act was enacted to supplement Section 77 of the Bankruptcy Act and to establish a special form of reorganization of the railroad businesses of only a designated handful of bankrupt railroads at a particular time (1973) and place (the northeastern United States). Section 77 has no prospective applicability, and the Rail Act's narrow objective has now been accomplished. This case is doubtless one of the last that will arise under any provision of those acts, and the opinion of the court of appeals is of no significance for bankruptcy proceedings in general.

Moreover, the decision below does not conflict with the decisions of the Eighth and Ninth Circuits cited by petitioner; nor can it so conflict in view of the fact that neither of those cases was governed by the statutes whose construction controls here. Nor is the "absolute priority rule" in any way implicated in the dispute between Conrail and Erie. All that is at stake on the petition is whether it was "just and reasonable"

for Conrail to be barred from diluting the already deficient distribution to allowed creditors of the defunct Erie Lackawanna Railway Company by enforcing new indemnity claims against a fund previously allocated by the district court. The courts below have resolved this dispute between Conrail and Erie; since nothing more is at stake, the petition should be denied.

A. The Sixth Circuit Correctly Interpreted the Rail Act

After ten years of bankruptcy proceedings, the district court determined that allowed claims against the defunct Erie railroad far exceeded its assets; that the shareholder's equity was worthless and would be wiped out; that all business operations of the Debtor had permanently ceased; and that the Debtor's property should be liquidated for the satisfaction of priority claims and distribution of the residue to allowed general creditors at 52¢ per dollar of allowed claim.

This case arises solely because of the administrative mechanism chosen by the district court to carry out these determinations. Petitioner acknowledged below and acknowledges here (Pet. at 10) that the court had the power under the Rail Act to accomplish the result it deemed "just and reasonable" by explicitly converting the Section 77 proceeding into a statutory liquidation.¹¹ If it had done so, there is no question that petitioner's claims would be barred (*see* opinion at A-5, A-7). The rule in statutory liquidation is that only claims filed prior to the bar date can participate in pro rata distribution of the bankrupt's estate; claims "not filed within the [prescribed] time" may be paid *only* out of the surplus —

11. Unlike Chapter X, relied on by petitioner, Section 77 itself did not permit such conversion; the court's power to convert is derived solely from the broad discretion granted by Section 601(b)(4) of the Rail Act, as petitioner acknowledges.

if any — remaining after “all claims which have been duly allowed have been paid in full.” Bankruptcy Act § 57n, former 11 U.S.C. § 93(n). The bar date in statutory liquidation is absolute, and no justification or excuse permits a late claim to dilute the discounted pro rata share of allowed creditors. See, e.g., *In re Pigott*, 684 F.2d 239, 245 (3d Cir. 1982); *Tarbell v. Crex Carpet Co.*, 90 F.2d 683 (8th Cir. 1937); *In re Sullivan*, 36 Bankr. 771 (Bankr. E.D.N.Y. 1984); *In re Weis Securities, Inc.*, 411 F. Supp. 194 (S.D.N.Y. 1975), *aff’d per curiam*, 538 F.2d 317 (2d Cir. 1976).¹²

Here, there was no surplus; the Debtor’s estate was insufficient to satisfy the timely filed creditor claims in their allowed amount. The absence of any surplus over such creditors’ claims was so clear in the Debtor’s case that the Debtor’s sole shareholder never sought at any time during the entire proceeding to participate in the estate. General creditors received value of only 52¢ per dollar of the allowed amount of their claims, and thus there was nothing left for post-consummation claims.¹³

12. Conrail is thus mistaken when, citing provisions of Section 77, it says that the former employees here involved would have had priority in a “true liquidation” over the claims of the unsecured creditors (Pet. at 13). If the proceeding had been converted to a statutory liquidation, Section 57n of the Bankruptcy Act would have governed. If Judge Krupansky had converted Erie’s proceedings to a straight liquidation following the conveyance of the rail business of Erie in 1976, the bar dates provided in Section 57n would have expired far earlier than the bar date of November 30, 1982 established in the court’s decree.

13. Much of the increase in book value of the stock of Erie since consummation of the Plan in 1982, to which Conrail refers (Pet. at 13), is due to the interest income earned since 1982 on the moneys in the Master Trust ultimately distributable to the Debtor’s general creditors (now the Erie stockholders). The general creditors have not yet received any cash on account of the stock issued under the Plan.

Petitioner's argument amounts to a claim that Judge Krupansky erred in barring its claims because the mechanism he had chosen for liquidation was a "liquidating corporation" created by a plan adopted under Section 77 rather than a statutory trustee. To bolster this argument, petitioner inaccurately states that the Rail Act limited the district court to only two choices: "to reorganize under Section 77 or to liquidate pursuant to some other section of the Bankruptcy Act" (Pet. at 10). However, the Rail Act did not put the district court in the strait jacket suggested by petitioners. Rather, it explicitly authorized the district court, as one of its options, to liquidate under Section 77. Recognizing that Section 77 did not itself provide a mechanism for liquidating a railroad, it then granted the court the discretion to "liquidate such railroad in reorganization pursuant to Section 77 on such terms as the court deems just and reasonable"

To further bolster its argument, petitioner asserts that the courts below allowed the Debtor to "enjoy the benefits" of reorganization, "continue in operation in perpetuity," reap "equity-type rewards [without] equity-type risks," operate "as a profitable corporation," and "sail unencumbered into the twenty-first century." (Pet. at 7, 11, 13). On the contrary, the courts below premised their decisions on the fact that the Debtor's equity and business had ceased to exist altogether, and that respondent is nothing more than a vehicle for liquidating the business property and holding the proceeds in banks or low-risk debt instruments until they are distributed to the allowed creditors and their assignees, whereupon Erie will be "completely liquidated" as required by the Plan.¹⁴

14. Petitioner seeks to avoid the uniqueness of these facts by misleadingly suggesting that the Special Court established under the Rail Act has recently found "that the Reorganized Company was in the same position as several other former railroads that had conveyed rail assets to Conrail and reorganized as non-railroads." (Pet. at 11-12, n. 3). However, the Special

While petitioner relies heavily on the provision of the Plan which allows the liquidating corporation to continue in existence (after all prior claims have been provided for) upon a vote of at least 75% of the shares outstanding, the court of appeals correctly noted (A-7 to A-8) that the unlikely event of such a supermajority vote does not change the economic reality that the Debtor's business has completely ceased to exist. After completion of disposition of all the property, the Debtor's assets will have been reduced entirely to cash, which 75% of its former general creditors might theoretically pool and reinvest in a new and entirely unrelated common enterprise within the corporate shell of respondent.¹⁵ Any future decision of Erie's creditor-stockholders to continue to pool their distributive shares would not alter the fact that, under the circumstances of this case, the distribution to those creditors constituted a liquidation of the Debtor which insulated the distributees and their assignees from post-liquidation claims based on pre-1976 operations of the Debtor. As the court of appeals correctly stated, "[i]f a straight liquidation was ordered, nothing would prohibit the unsecured creditors from embarking on a new business enterprise with the funds they received, without the worry of a lawsuit." (A-7).

The form of liquidation chosen by the district court was not crafted to enable Erie to "sail into the twenty-first century" while "operating a profitable corporation." Its sole

Court opinion cited by petitioners had nothing to do with Section 601(b)(4) of the Rail Act. Rather, the Special Court merely held that Section 709(b) of the Rail Act neither provided an explicit basis for recovery against Conrail by former employees of the bankrupt railroads nor insulated Conrail from liability under tort law theories of successor liability. In reaching that conclusion, the Special Court merely noted that, like the other railroads before the court, the Debtor's Section 77 proceeding had been terminated.

15. That such a vote would be equivalent to a voluntary new investment of cash by each ex-creditor is made clear by the absolute right of any shareholder dissenting from the vote to withdraw his share of the cash (A-68 to A-69).

purpose was the efficient administration of the estate and the maximization of net proceeds available for distribution to creditors. Statutory liquidation would have required wasteful and cumbersome court proceedings to approve the sale of the Debtor's miscellaneous pieces of property, and would have deprived those trade creditors who needed ready cash of an efficient market in which to sell assignments of their interest in the liquidation.¹⁶

Petitioner's contention (Pet. at 13-14) that on the basis of the decision below "any corporation in bankruptcy" will be encouraged to structure its reorganization to include a "liquidation option" and thus cut-off post-consummation claims is ridiculous. The Rail Act does not apply to "any corporation in bankruptcy" and does not even apply to future railroad reorganizations. Moreover, the decision of the court of appeals below was not based on any "liquidation option;" on the contrary, it was based on the mandated cessation of the Debtor's business and the requirements of the Plan that *all* assets be liquidated and reduced to cash and that all proceeds of the liquidation be placed in trust subject to severe restrictions. What corporation able to effect a true reorganization of any part of its business would ever prefer such a suicidal procedure? Given that in the great majority of corporate reorganizations there are assets sufficient to permit participation by the stockholders in the reorganized business, the possible use of this case, where no surplus for stockholders

16. Petitioner argued below that its claims were enforceable against Erie because the liquidating corporation was established by charter amendment rather than dissolution and reincorporation. This argument that the district court was required to follow a particular form in order to achieve the result it "deemed just and reasonable" is inconsistent with the Rail Act and was properly rejected below. Reincorporation would have required the burdensome and expensive conveyancing and recording in the name of the new corporation of hundreds of parcels of real property located in several states, even though the liquidating corporation was to sell the real estate as soon as practicable after consummation.

existed, as a "persuasive precedent" in barring post-consummation claims in other corporate bankruptcy proceedings, even by analogy, is highly remote indeed.

Compelling considerations of administrative efficiency led the district court to conclude that a hybrid form of liquidation was "in the best interests of such estate." The court of appeals correctly held that Section 601(b)(4) of the Rail Act gave the district court sufficient flexibility to do so (A-7 and n. 4). As the court of appeals held, the district court's orders making provision for priority creditors to be paid in cash and directing the distribution to the general creditors of Erie's stock constituted the liquidation of the Debtor under a plan with terms which were "just and reasonable." For the foregoing reasons, the writ of certiorari should be denied.

**B. The Decision Below Does Not Conflict
with Decisions of the Eighth and Ninth
Circuits**

Petitioner asserts that the opinion of the court of appeals is in direct conflict with the decisions of the Eighth and Ninth Circuits in *Bankers Life & Casualty Co. v. Kirtley*, 338 F.2d 1006 (8th Cir. 1964) and *Kelce v. U.S. Financial Inc.*, 648 F.2d 515 (9th Cir. 1980), *cert denied*, 451 U.S. 970 (1981). However, the facts of those cases do not remotely resemble the facts below, and the holdings of the Eighth and Ninth Circuits do not in any way address the issue before the court of appeals below. The opinion of the court of appeals, a correct application of the Rail Act to unique facts, simply does not conflict with the decision of any other federal court.

In *Bankers Life & Casualty Co. v. Kirtley*, a Chapter X proceeding, the district court had ordered equitable subordination of the interest of two controlling stockholders to that of the debtor's public stockholders. The controlling stockholders appealed, claiming that the district court lacked the power of equitable subordination because the reorganization plan called not for rehabilitation but for

liquidation of the debtor's assets. Arguing that liquidation is not concerned with equities among stockholders after the rights of creditors are satisfied, the controlling stockholders claimed it was reversible error for the district court to exercise equitable powers expressly granted by Chapter X in a Chapter X proceeding which contemplated liquidation. The Eighth Circuit rejected this argument and affirmed. It noted that Chapter X rules specifically permitted the sale of all of the debtor's assets (*i.e.*, a liquidation) and modification of the rights of stockholders. The court held that it was not error for the district court to apply these specific Chapter X rules in a Chapter X proceeding.¹⁷

In *Kelce v. U.S. Financial Inc.*, a defrauded shareholder sought reversal of an order subordinating his fraud claim to those of general creditors. The Ninth Circuit affirmed, holding that it would violate the absolute priority rule to allow a stockholder to share in the debtor's estate on equal footing with unsatisfied creditors. Citing *Bankers Life*, the Ninth Circuit in dictum in a footnote rejected the appellant's attempt to distinguish the rationale given by commentators for subordinating a shareholder's fraud claim to claims of creditors. Appellant had urged that the commentators' arguments did not apply to a Chapter X reorganization in which liquidation was the ultimate goal, and the Ninth Circuit disagreed.

Even the most cursory analysis makes clear that the opinion of the court of appeals below does not conflict in any way, let alone directly, with these decisions. Both *Bankers Life* and *Kelce* involved the formulation of reorganization plans and questions with regard to the application of Chapter

17. In holding that it was not error for the district court to apply Chapter X rules in a Chapter X proceeding, the court in *Bankers Life* did not address whether it would have been improper for the district court to fashion a plan utilizing other bankruptcy rules.

X rules to claims asserted during the course of Chapter X reorganization proceedings. Neither case involved the Rail Act's broad grant of discretion to the district court to liquidate the debtor "pursuant to Section 77 on such terms as the court deems just and reasonable." More importantly, those cases are concerned only with rules on issues concerning priority of claims that apply in formulating a plan; neither case addressed the issue here involved, *i.e.*, whether claims filed after consummation of a liquidating plan are barred as against creditors by reason of the liquidating nature of the plan.

Petitioner also asserts that the court of appeals below completely misread the effect of the liquidation of a corporate debtor and ignored "fundamental bankruptcy law" in barring petitioner's claims (Pet. at 12). This argument is astonishing given petitioner's concession below that claims filed after the bar date in a straight bankruptcy liquidation could not be enforced against the interest of allowed creditors. The fact cited by petitioner that "liquidation would not have discharged [the claimants'] claims" (Pet. at 12) simply is irrelevant and was properly not addressed by the court of appeals. Not even non-discharged late claims can be enforced in straight bankruptcy so as to diminish the pro rata share in the estate of creditors whose claims were filed before the bar date and allowed by the court. A non-discharged claim which is filed after the bar date can be satisfied only out of the surplus, if any, available for the stockholders. Here, there was no surplus.

In citing to *Kelce*, petitioner underscores the importance to bankruptcy proceedings of fulfilling just expectations (Pet. at 10). Here, the just expectations of participants in the Debtor's bankruptcy proceeding would be thwarted if petitioner's position prevailed. Contrary to the assertions of petitioner, the Debtor's creditors did not bargain for equity-type rewards in exchange for equity-type risks (Pet. at 11). As the court of appeals correctly recognized (A-6 to A-7), it is factually incorrect to speak of the creditors as accepting the

risk of Erie's "business." Erie has no business; the Plan extinguished all equity interest in the Debtor and provided that the *only* activities of Erie would be those required for its liquidation. In such circumstances, permitting petitioners now to enforce their claims would improperly dilute the allowed claims of the Debtor's creditors and would frustrate the creditors' legitimate expectations that the compromises made in the liquidation plan would be accorded finality.

C. The "Absolute Priority Rule" Has Nothing to Do with This Case

Petitioner argues that the decision of the court of appeals "conflicts with both the congressionally mandated claim priority scheme and the absolute priority rule pronounced by this Court." (Pet. at 14). For two reasons this argument does not warrant review by this Court.

First, while personal injury claims of a railroad debtor's employees were entitled to priority under Section 77, petitioner is not a former employee of the Debtor and is not asserting a personal injury claim. Rather, petitioner Conrail is a billion-dollar public company asserting an indemnification claim against the liquidating corporation while at the same time denying its liability to the Debtor's former employees. Most of the individual former employees of the Debtor whose claims were the subject of the proceedings below did not appeal the district court's decision barring their claims as against Erie, and the two individuals who pursued their appeals in the Sixth Circuit, respondents Henning and LaScala, have not petitioned for certiorari.

Second, the decision below clearly does not violate either the Section 77 priority granted employee personal injury claims or the absolute priority rule. As petitioner conceded below, claims filed after the bar date in a straight bankruptcy liquidation could not be enforced against the interests of allowed creditors. *See* Section 57n of the Bankruptcy Act of 1898. Even as to priority claims, there comes a cut-off time

where the assets of a liquidating, insolvent corporate debtor are allocated among qualifying creditors then present, whereupon the Debtor becomes a "judgment proof" empty shell.

Nothing in *Northern Pacific R.R. v. Boyd*, 228 U.S. 482 (1913) and its progeny is to the contrary. While *Boyd* recognized the right of a creditor who did not participate in a reorganization to subject the interests of a Debtor's old stockholders to his claim, *Boyd* specifically recognized that "[i]f [the stockholders'] interest is valueless, [the creditor] gets nothing." 228 U.S. at 508. Here, the district court found in 1982 that the Debtor's stock was worthless. The court, therefore, properly barred petitioner's post-consummation claims.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

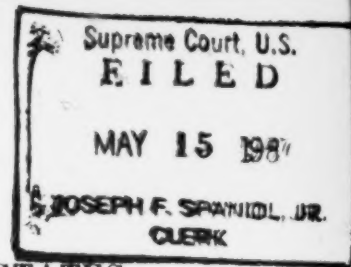
Dated: May 6, 1987

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No. 86-1612



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

CONSOLIDATED RAIL CORPORATION,
Petitioner,
v.

*ERIE LACKAWANNA INC.,
JOHN HENNING, and VICTOR LASCALE,
Respondents.

**ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT**

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

**The Sixth Circuit's Opinion Is Not
Confined to "Unique Facts" or
"Obsolete Statutes" But Rather Applies
to Circumstances Commonly Found
in Many Corporate Bankruptcy Proceedings.**

Respondent Erie Lackawanna Inc. predictably characterizes the decision below as based upon "unique facts" and "two virtually obsolete statutes," namely the Regional Rail Reorganization Act of 1973 ("Rail Act") and the Bankruptcy Act of 1898. But that portrayal of the Sixth Circuit's decision is as fictitious as the Sixth Circuit's treatment of respondent as comparable to a liquidated company. The Sixth Circuit's opinion reveals

quite clearly that the court did not confine its decision to "unique facts" or base it on "obsolete statutes."

The Sixth Circuit stated:

" . . . the nature of the restructuring of Debtor [Erie Lackawanna Railway], in which general unsecured creditors became shareholders of Erie Lackawanna, Inc., mitigates against holding Erie Lackawanna, Inc. liable on any claims" (A-2).

* * *

" . . . the new reorganized Erie appears to be a corporation of the creditors, by the creditors and for the creditors" (A-3).

* * *

"In practical terms, Erie's restructuring was similar to a liquidation; the debtor's assets were used to satisfy the claims of creditors, and debtor's previous business (operating a railway line) ceased to exist. All that remained were the non-rail assets." (A-7).

* * *

"By leaving the bare bones of Erie intact, and by providing for the possibility of Erie Lackawanna, Inc.'s continued business existence, these creditors may be able to come out whole" (A-7).

Whatever consideration the Sixth Circuit could have given to the purportedly anomalous circumstances of the Erie Lackawanna bankruptcy reorganization, the Sixth Circuit actually based its decision to immunize respondent from claims on three common occurrences — (1) that the debtor's unsecured creditors became shareholders in the reorganized company, (2) that the reorganized company abandoned its previous business and engaged in new operations, and (3) that the plan approved in the bankruptcy proceeding contemplated a possible post-bankruptcy liquidation of the reorganized company.

Significantly, the brief in opposition does not even attempt to portray the Sixth Circuit's "hybrid" reorganization-liquidation" as consistent with general principles of bankruptcy law. Rather, respondent argues that the Rail Act gave its reorganization court a latitude that is not enjoyed by any other court in any other reorganization or liquidation under any bankruptcy statute.

According to respondent, its reorganization court's unique authority derived from a Rail Act provision that permitted the court "to reorganize or liquidate such railroad in reorganization pursuant to Section 77 on such terms as the court deems just and reasonable," 45 U.S.C. § 791(b)(4). But what is it that respondent finds to have been "just and reasonable?" A proceeding in which the court sanctioned a corporate form that was neither a liquidation nor a reorganization. A proceeding in which the corporate entity became insulated as of November 30, 1982, from liability on future claims even though the corporate entity continued to have working capital, increasing assets, and corporate tax benefits. A proceeding in which entities, such as Conrail, may find themselves vicariously liable for the reorganized entity's pre-reorganization conduct on claims that had not arisen and could not have been asserted by Conrail or anyone else before November 30, 1982. A proceeding in which the entity can look at its balance sheet as of November 30, 1982, declare its poverty *as of then*, proceed to amass millions of additional dollars, and still cry that it is too poor to compensate the victims of its own previous wrongful conduct. A proceeding in which an allegedly "liquidated" company has publicly traded stock that has increased in value in the past four years from \$45 per share (A-234) to \$114 per share (*Wall Street Journal*, May 13, 1987), so that any current creditor-shareholders have been "able to come out [more than] whole." According to respondent, Congress and the courts sanction such results as "just and reasonable."

But the terms "just and reasonable" do not confer absolute discretion on reorganization courts. The underlying premises of the Sixth Circuit's decision, (1) that a reorganization in which creditors receive stock in the reorganized company constitutes a liquidation and (2) that claims cannot "ensue" in a liquidation (A-5), are not only fundamental misstatements of existing bankruptcy law but departures with far-reaching consequences. Countless corporations have reorganized and many more will do so pursuant to plans where creditors receive securities instead of cash and where eventual liquidation of the reorganized corporation may be contemplated. In all such cases, the reorganized company, whether just emerging from bankruptcy or years later, can now use the Sixth Circuit's decision to contend that it is not liable for any claims, including claims that were not discharged in its bankruptcy proceeding. Unless this Court grants the petition for a writ of certiorari, the opinion below will inevitably be seized upon by reorganized companies seeking to avoid liability for non-discharged claims.

The decision below immunizes a corporation from liability for existing, non-discharged and unsatisfied claims. Respondent attempts to justify this unprecedented result by arguing that the Sixth Circuit was merely enforcing an allocation of assets that was pre-determined over four years ago although no distribution has yet occurred. Respondent, however, does not and cannot explain how its reorganization court had the unprecedented power to allocate respondent's future earnings for the benefit of some parties, while excluding other parties with non-discharged claims. The reorganization court recognized what the Sixth Circuit did not, that it had such authority only to the extent that it could discharge claims under applicable bankruptcy law. Thus, the sole basis for the reorganization court's injunction against the post-consummation claims asserted by Conrail and respondent's former employees was that

those claims (though non-existent at the time of the consummation order) had been discharged (A-33 to A-36). In so holding, the reorganization court specifically declined to follow the Third Circuit's decision in *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 106 S. Ct. 183 (1985). The Sixth Circuit, seeking to avoid a direct conflict with the Third Circuit, did not address the question of the dischargeability of future claims. Instead, the Sixth Circuit chose to give respondent immunity from future claims by devising a "hybrid" reorganization-liquidation" concept that has been expressly rejected by the Eighth and Ninth Circuits (see Petition for a Writ of Certiorari, at 8-11). However, absent a specific finding of discharge, a court has no power to allocate assets to certain claims and immunize respondent from other claims of comparable or higher priority.

CONCLUSION

The petition for a writ of certiorari should be granted.

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